UNITED STATES REPORTS

VOLUME 376

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1963

FEBRUARY 17 THROUGH APRIL 6, 1964

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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DEPOSITED BY THE
UNITED STATES OF AMERICA

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

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STANLEY REED, Associate Justice.
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JOHN F. DAVIS, Clerk.
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T. PERRY LIPPITT, Marshal.
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SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. IV.)

APPOINTMENT OF REPORTER OF DECISIONS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 17, 1964.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

THE CHIEF JUSTICE said:

"On behalf of the Court, I announce the appointment of Henry Putzel, jr., as Reporter of Decisions effective February 17, 1964. Mr. Putzel comes to us after a distinguished career in the Department of Justice. We are very happy to have him with us as an officer of this Court."

THE CHIEF JUSTICE administered the oaths of office to Mr. Putzel in chambers on Monday, February 17, 1964.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1963.

WESBERRY ET AL. *v.* SANDERS, GOVERNOR OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 22. Argued November 18–19, 1963.—Decided February 17, 1964.

Appellants are qualified voters in Georgia's Fifth Congressional District, the population of which is two to three times greater than that of some other congressional districts in the State. Since there is only one Congressman for each district, appellants claimed debasement of their right to vote resulting from the 1931 Georgia apportionment statute and failure of the legislature to realign that State's congressional districts more nearly to equalize the population of each. They brought this class action under 42 U. S. C. §§ 1983 and 1988 and 28 U. S. C. § 1343 (3) asking that the apportionment statute be declared invalid and that appellees, the Governor and Secretary of State, be enjoined from conducting elections under it. A three-judge District Court, though recognizing the gross population imbalance of the Fifth District in relation to the other districts, dismissed the complaint for "want of equity." *Held:*

1. As in *Baker* v. *Carr*, 369 U. S. 186, which involved alleged malapportionment of seats in a state legislature, the District Court had jurisdiction of the subject matter; appellants had standing to sue; and they had stated a justiciable cause of action on which relief could be granted. Pp. 5–6.

2. A complaint alleging debasement of the right to vote as a result of a state congressional apportionment law is not subject to

dismissal for "want of equity" as raising a wholly "political" question. Pp. 6–7.

3. The constitutional requirement in Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's. Pp. 7–8, 18.

206 F. Supp. 276, reversed and remanded.

Frank T. Cash, pro hac vice, by special leave of Court, and *Emmet J. Bondurant II* argued the cause for appellants. With them on the brief was *DeJongh Franklin.*

Paul Rodgers, Assistant Attorney General of Georgia, argued the cause for appellees. With him on the brief was *Eugene Cook,* Attorney General of Georgia.

Bruce J. Terris, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox* and *Richard W. Schmude.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellants are citizens and qualified voters of Fulton County, Georgia, and as such are entitled to vote in congressional elections in Georgia's Fifth Congressional District. That district, one of ten created by a 1931 Georgia statute,[1] includes Fulton, DeKalb, and Rockdale Counties and has a population according to the 1960 census of 823,680. The average population of the ten districts is 394,312, less than half that of the Fifth. One district, the Ninth, has only 272,154 people, less than one-third as many as the Fifth. Since there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.

[1] Ga. Code, § 34–2301.

Claiming that these population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians, the appellants brought this action under 42 U. S. C. §§ 1983 and 1988 and 28 U. S. C. § 1343 (3) asking that the Georgia statute be declared invalid and that the appellees, the Governor and Secretary of State of Georgia, be enjoined from conducting elections under it. The complaint alleged that appellants were deprived of the full benefit of their right to vote, in violation of (1) Art. I, § 2, of the Constitution of the United States, which provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."; (2) the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment; and (3) that part of Section 2 of the Fourteenth Amendment which provides that "Representatives shall be apportioned among the several States according to their respective numbers . . . ."

The case was heard by a three-judge District Court, which found unanimously, from facts not disputed, that:

> "It is clear by any standard . . . that the population of the Fifth District is grossly out of balance with that of the other nine congressional districts of Georgia and in fact, so much so that the removal of DeKalb and Rockdale Counties from the District, leaving only Fulton with a population of 556,326, would leave it exceeding the average by slightly more than forty per cent." [2]

Notwithstanding these findings, a majority of the court dismissed the complaint, citing as their guide Mr. Justice Frankfurter's minority opinion in *Colegrove* v. *Green*, 328 U. S. 549, an opinion stating that challenges to appor-

[2] *Wesberry* v. *Vandiver*, 206 F. Supp. 276, 279–280.

tionment of congressional districts raised only "political" questions, which were not justiciable. Although the majority below said that the dismissal here was based on "want of equity" and not on nonjusticiability, they relied on no circumstances which were peculiar to the present case; instead, they adopted the language and reasoning of Mr. Justice Frankfurter's *Colegrove* opinion in concluding that the appellants had presented a wholly "political" question.[3] Judge Tuttle, disagreeing with the court's reliance on that opinion, dissented from the dismissal, though he would have denied an injunction at that time in order to give the Georgia Legislature ample opportunity to correct the "abuses" in the apportionment. He relied on *Baker* v. *Carr*, 369 U. S. 186, which, after full discussion of *Colegrove* and all the opinions in it, held that allegations of disparities of population in state legislative districts raise justiciable claims on which courts may grant relief. We noted probable jurisdiction. 374 U. S. 802. We agree with Judge Tuttle that in debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution, that the District Court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss this suit. The question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances.

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[3] "We do not deem [*Colegrove* v. *Green*] . . . to be a precedent for dismissal based on the nonjusticiability of a political question involving the Congress as here, but we do deem it to be strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress." 206 F. Supp., at 285 (footnote omitted).

I.

Baker v. *Carr, supra,* considered a challenge to a 1901 Tennessee statute providing for apportionment of State Representatives and Senators under the State's constitution, which called for apportionment among counties or districts "according to the number of qualified voters in each." The complaint there charged that the State's constitutional command to apportion on the basis of the number of qualified voters had not been followed in the 1901 statute and that the districts were so discriminatorily disparate in number of qualified voters that the plaintiffs and persons similarly situated were, "by virtue of the debasement of their votes," denied the equal protection of the laws guaranteed them by the Fourteenth Amendment.[4] The cause there of the alleged "debasement" of votes for state legislators—districts containing widely varying numbers of people—was precisely that which was alleged to debase votes for Congressmen in *Colegrove* v. *Green, supra,* and in the present case. The Court in *Baker* pointed out that the opinion of Mr. Justice Frankfurter in *Colegrove,* upon the reasoning of which the majority below leaned heavily in dismissing "for want of equity," was approved by only three of the seven Justices sitting.[5] After full consideration of *Colegrove,* the Court in *Baker* held (1) that the District Court had jurisdiction of the subject matter; (2) that the qualified Tennessee voters there had standing to sue; and

[4] 369 U. S., at 188.

[5] Mr. Justice Rutledge in *Colegrove* believed that the Court should exercise its equitable discretion to refuse relief because "The shortness of the time remaining [before the next election] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek." 328 U. S., at 565. In a later separate opinion he emphasized that his vote in *Colegrove* had been based on the "particular circumstances" of that case. *Cook* v. *Fortson,* 329 U. S. 675, 678.

(3) that the plaintiffs had stated a justiciable cause of action on which relief could be granted.

The reasons which led to these conclusions in *Baker* are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:

> ". . . *Smiley* v. *Holm*, 285 U. S. 355, *Koenig* v. *Flynn*, 285 U. S. 375, and *Carroll* v. *Becker*, 285 U. S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision." [6]

This statement in *Baker*, which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, § 4, of the Constitution [7] had given Congress "exclusive authority" to protect the right of citizens to vote for Congressmen,[8] but we made it clear in *Baker* that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury* v. *Madison*, 1 Cranch 137, in 1803. Cf. *Gib-*

[6] 369 U. S., at 232. Cf. also *Wood* v. *Broom*, 287 U. S. 1.

[7] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. . . ." U. S. Const., Art. I, § 4.

[8] 328 U. S., at 554.

bons v. *Ogden,* 9 Wheat. 1. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of "want of equity" than on the ground of "nonjusticiability." We therefore hold that the District Court erred in dismissing the complaint.

II.

This brings us to the merits. We agree with the District Court that the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District. A single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" [9] means that as

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[9] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

. . . . . .

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Man-

nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.[10] This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history.[11] It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. Cf. *Gray* v. *Sanders,* 372 U. S. 368. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Con-

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ner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . ." U. S. Const., Art. I, § 2.

The provisions for apportioning Representatives and direct taxes have been amended by the Fourteenth and Sixteenth Amendments, respectively.

[10] We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.

[11] As late as 1842, seven States still conducted congressional elections at large. See Paschal, "The House of Representatives: 'Grand Depository of the Democratic Principle'?" 17 Law & Contemp. Prob. 276, 281 (1952).

stitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

During the Revolutionary War the rebelling colonies were loosely allied in the Continental Congress, a body with authority to do little more than pass resolutions and issue requests for men and supplies. Before the war ended the Congress had proposed and secured the ratification by the States of a somewhat closer association under the Articles of Confederation. Though the Articles established a central government for the United States, as the former colonies were even then called, the States retained most of their sovereignty, like independent nations bound together only by treaties. There were no separate judicial or executive branches: only a Congress consisting of a single house. Like the members of an ancient Greek league, each State, without regard to size or population, was given only one vote in that house. It soon became clear that the Confederation was without adequate power to collect needed revenues or to enforce the rules its Congress adopted. Farsighted men felt that a closer union was necessary if the States were to be saved from foreign and domestic dangers.

The result was the Constitutional Convention of 1787, called for "the sole and express purpose of revising the Articles of Confederation . . . ." [12] When the Conven-

[12] 3 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 14 (hereafter cited as "Farrand").

James Madison, who took careful and complete notes during the Convention, believed that in interpreting the Constitution later generations should consider the history of its adoption:

"Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided." *Id.*, at 549.

tion met in May, this modest purpose was soon abandoned for the greater challenge of creating a new and closer form of government than was possible under the Confederation. Soon after the Convention assembled, Edmund Randolph of Virginia presented a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature of two Houses, one house to be elected by "the people," the second house to be elected by the first.[13]

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. One principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress. In support of this principle, George Mason of Virginia

> "argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt." [14]

James Madison agreed, saying "If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all." [15] Repeatedly, delegates rose to make the same point: that it would be unfair, unjust, and contrary to common sense to give a small number of people as many Senators or Representatives as were allowed to much larger groups [16]—in short, as James Wilson of Pennsyl-

[13] 1 *id.*, at 20.

[14] *Id.*, at 48.

[15] *Id.*, at 472.

[16] See, *e. g.*, *id.*, at 197–198 (Benjamin Franklin of Pennsylvania); *id.*, at 467 (Elbridge Gerry of Massachusetts); *id.*, at 286, 465–466 (Alexander Hamilton of New York); *id.*, at 489–490 (Rufus King of Massachusetts); *id.*, at 322, 446–449, 486, 527–528 (James Madison of Virginia); *id.*, at 180, 456 (Hugh Williamson of North Carolina); *id.*, at 253–254, 406, 449–450, 482–484 (James Wilson of Pennsylvania).

vania put it, "equal numbers of people ought to have an equal no. of representatives . . ." and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other." [17]

Some delegates opposed election by the people. The sharpest objection arose out of the fear on the part of small States like Delaware that if population were to be the only basis of representation the populous States like Virginia would elect a large enough number of representatives to wield overwhelming power in the National Government.[18] Arguing that the Convention had no authority to depart from the plan of the Articles of Confederation which gave each State an equal vote in the National Congress, William Paterson of New Jersey said, "If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty." [19] To this end he proposed a single legislative chamber in which each State, as in the Confederation, was to have an equal vote.[20] A number of delegates supported this plan.[21]

The delegates who wanted every man's vote to count alike were sharp in their criticism of giving each State,

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[17] *Id.*, at 180.

[18] Luther Martin of Maryland declared

"that the States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty: that the propositions on the table were a system of slavery for 10 States: that as Va. Masts. & Pa. have 42/90 of the votes they can do as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest . . . ." *Id.*, at 438.

[19] *Id.*, at 251.

[20] 3 *id.*, at 613.

[21] *E. g.*, 1 *id.*, at 324 (Alexander Martin of North Carolina); *id.*, at 437–438, 439–441, 444–445, 453–455 (Luther Martin of Maryland); *id.*, at 490–492 (Gunning Bedford of Delaware).

regardless of population, the same voice in the National Legislature. Madison entreated the Convention "to renounce a principle wch. was confessedly unjust," [22] and Rufus King of Massachusetts "was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as shortlived as it would be unjust." [23]

The dispute came near ending the Convention without a Constitution. Both sides seemed for a time to be hopelessly obstinate. Some delegations threatened to withdraw from the Convention if they did not get their way.[24] Seeing the controversy growing sharper and emotions rising, the wise and highly respected Benjamin Franklin arose and pleaded with the delegates on both sides to "part with some of their demands, in order that they may join in some accomodating proposition." [25] At last those who supported representation of the people in both houses and those who supported it in neither were brought together, some expressing the fear that if they did not reconcile their differences, "some foreign sword will probably do the work for us." [26] The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise,[27] based on a proposal which had been repeatedly advanced by Roger

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[22] *Id.*, at 464.

[23] *Id.*, at 490.

[24] Gunning Bedford of Delaware said:

"We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good Governmt. . . . The Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice." *Id.*, at 492.

[25] *Id.*, at 488.

[26] *Id.*, at 532 (Elbridge Gerry of Massachusetts). George Mason of Virginia urged an "accomodation" as "preferable to an appeal to the world by the different sides, as had been talked of by some Gentlemen." *Id.*, at 533.

[27] See *id.*, at 551.

Sherman and other delegates from Connecticut.[28] It provided on the one hand that each State, including little Delaware and Rhode Island, was to have two Senators. As a further guarantee that these Senators would be considered state emissaries, they were to be elected by the state legislatures, Art. I, § 3, and it was specially provided in Article V that no State should ever be deprived of its equal representation in the Senate. The other side of the compromise was that, as provided in Art. I, § 2, members of the House of Representatives should be chosen "by the People of the several States" and should be "apportioned among the several States . . . according to their respective Numbers." While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson of Connecticut had summed it up well: "in *one* branch the *people*, ought to be represented; in the *other*, the *States*." [29]

The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.[30] The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," [31] an idea endorsed by Mason as assuring that "numbers of inhabitants"

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[28] See *id.*, at 193, 342–343 (Roger Sherman); *id.*, at 461–462 (William Samuel Johnson).

[29] *Id.*, at 462. (Emphasis in original.)

[30] While "free Persons" and those "bound to Service for a Term of Years" were counted in determining representation, Indians not taxed were not counted, and "three fifths of all other Persons" (slaves) were included in computing the States' populations. Art. I, § 2. Also, every State was to have "at Least one Representative." *Ibid.*

[31] 1 Farrand, at 580.

should always be the measure of representation in the House of Representatives.[32] The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to wealth.[33] And the delegates defeated a motion made by Elbridge Gerry to limit the number of Representatives from newer Western States so that it would never exceed the number from the original States.[34]

It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. The delegates were quite aware of what Madison called the "vicious representation" in Great Britain[35] whereby "rotten boroughs" with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. Wilson urged that people must be represented as individuals, so that America would escape

[32] *Id.*, at 579.

[33] *Id.*, at 606. Those who thought that one branch should represent wealth were told by Roger Sherman of Connecticut that the "number of people alone [was] the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers." *Id.*, at 582.

[34] 2 *id.*, at 3. The rejected thinking of those who supported the proposal to limit western representation is suggested by the statement of Gouverneur Morris of Pennsylvania that "The Busy haunts of men not the remote wilderness, was the proper School of political Talents." 1 *id.*, at 583.

[35] *Id.*, at 464.

the evils of the English system under which one man could send two members to Parliament to represent the borough of Old Sarum while London's million people sent but four.[36] The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives.[37]

Madison in *The Federalist* described the system of division of States into congressional districts, the method which he and others [38] assumed States probably would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Fœderal Representatives." [39] "[N]umbers," he said, not only are a suitable way to represent wealth but in any event "are the only proper scale of representation." [40] In the state conventions, speakers urging ratification of the Constitution emphasized the theme of equal representation in the House which had permeated the debates in Phila-

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[36] *Id.*, at 457. "Rotten boroughs" have long since disappeared in Great Britain. Today permanent parliamentary Boundary Commissions recommend periodic changes in the size of constituencies, as population shifts. For the statutory standards under which these commissions operate, see House of Commons (Redistribution of Seats) Acts of 1949, 12 & 13 Geo. 6, c. 66, Second Schedule, and of 1958, 6 & 7 Eliz. 2, c. 26, Schedule.

[37] 2 *id.*, at 241.

[38] See, *e. g.*, 2 Works of Alexander Hamilton (Lodge ed. 1904) 25 (statement to New York ratifying convention).

[39] The Federalist, No. 57 (Cooke ed. 1961), at 389.

[40] *Id.*, No. 54, at 368. There has been some question about the authorship of Numbers 54 and 57, see The Federalist (Lodge ed. 1908) xxiii–xxxv, but it is now generally believed that Madison was the author, see, *e. g.*, The Federalist (Cooke ed. 1961) xxvii; The Federalist (Van Doren ed. 1945) vi–vii; Brant, "Settling the Authorship of *The Federalist*," 67 Am. Hist. Rev. 71 (1961).

delphia.[41] Charles Cotesworth Pinckney told the South Carolina Convention, "the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually . . . ." [42] Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures—such as those of Connecticut, Rhode Island, and South Carolina—and argued that the power given Congress in Art. I, § 4,[43] was meant to be used to vindicate the people's right to equality of representation in the House.[44] Congress' power, said John Steele at the North Carolina convention, was not to be used to allow Congress to create rotten boroughs; in answer to another delegate's suggestion that Congress might use its power to favor people living near the seacoast, Steele said that Congress "most probably" would "lay the state off into districts," and if it made laws "inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them." [45]

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[41] See, *e. g.*, 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d Elliot ed. 1836) 11 (Fisher Ames, in the Massachusetts Convention) (hereafter cited as "Elliot"); *id.*, at 202 (Oliver Wolcott, Connecticut); 4 *id.*, at 21 (William Richardson Davie, North Carolina); *id.*, at 257 (Charles Pinckney, South Carolina).

[42] *Id.*, at 304.

[43] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. . . ." U. S. Const., Art. I, § 4.

[44] See 2 Elliot, at 49 (Francis Dana, in the Massachusetts Convention); *id.*, at 50–51 (Rufus King, Massachusetts); 3 *id.*, at 367 (James Madison, Virginia).

[45] 4 *id.*, at 71.

Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:

> "[A]ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same." [46]

It is in the light of such history that we must construe Art. I, § 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen "by the People of the several States" and shall be "apportioned among the several States . . . according to their respective Numbers." It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted. *United States* v. *Mosley,* 238 U. S. 383; *Ex Parte Yarbrough,* 110 U. S. 651. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see *United States* v. *Classic,* 313 U. S. 299, or diluted by stuffing of the ballot box, see *United States* v. *Saylor,* 322 U. S. 385. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges

[46] 2 The Works of James Wilson (Andrews ed. 1896) 15.

this right. In urging the people to adopt the Constitution, Madison said in No. 57 of *The Federalist:*

> "Who are to be the electors of the Fœderal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. . . ." [47]

Readers surely could have fairly taken this to mean, "one person, one vote." Cf. *Gray* v. *Sanders,* 372 U. S. 368, 381.

While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Reversed and remanded.

MR. JUSTICE CLARK, concurring in part and dissenting in part.

Unfortunately I can join neither the opinion of the Court nor the dissent of my Brother HARLAN. It is true that the opening sentence of Art. I, § 2, of the Constitution provides that Representatives are to be chosen "by the People of the several States . . . ." However, in my view, Brother HARLAN has clearly demonstrated that both the historical background and language preclude a finding that Art. I, § 2, lays down the *ipse dixit* "one person, one vote" in congressional elections.

On the other hand, I agree with the majority that congressional districting is subject to judicial scrutiny. This

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[47] The Federalist, No. 57 (Cooke ed. 1961), at 385.

Court has so held ever since *Smiley* v. *Holm,* 285 U. S. 355 (1932), which is buttressed by two companion cases, *Koenig* v. *Flynn,* 285 U. S. 375 (1932), and *Carroll* v. *Becker,* 285 U. S. 380 (1932). A majority of the Court in *Colegrove* v. *Green* felt, upon the authority of *Smiley,* that the complaint presented a justiciable controversy not reserved exclusively to Congress. *Colegrove* v. *Green,* 328 U. S. 549, 564, and 568, n. 3 (1946). Again, in *Baker* v. *Carr,* 369 U. S. 186, 232 (1962), the opinion of the Court recognized that *Smiley* "settled the issue in favor of justiciability of questions of congressional redistricting." I therefore cannot agree with Brother HARLAN that the supervisory power granted to Congress under Art. I, § 4, is the exclusive remedy.

I would examine the Georgia congressional districts against the requirements of the Equal Protection Clause of the Fourteenth Amendment. As my Brother BLACK said in his dissent in *Colegrove* v. *Green, supra,* the "equal protection clause of the Fourteenth Amendment forbids . . . discrimination. It does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. . . . No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit." At 569.

The trial court, however, did not pass upon the merits of the case, although it does appear that it did make a finding that the Fifth District of Georgia was "grossly out of balance" with other congressional districts of the State. Instead of proceeding on the merits, the court dismissed the case for lack of equity. I believe that the court erred in so doing. In my view we should therefore vacate this judgment and remand the case for a hearing

on the merits. At that hearing the court should apply the standards laid down in *Baker* v. *Carr*, *supra*.

I would enter an additional caveat. The General Assembly of the Georgia Legislature has been recently reapportioned * as a result of the order of the three-judge District Court in *Toombs* v. *Fortson*, 205 F. Supp. 248 (1962). In addition, the Assembly has created a Joint Congressional Redistricting Study Committee which has been working on the problem of congressional redistricting for several months. The General Assembly is currently in session. If on remand the trial court is of the opinion that there is likelihood of the General Assembly's reapportioning the State in an appropriate manner, I believe that coercive relief should be deferred until after the General Assembly has had such an opportunity.

MR. JUSTICE HARLAN, dissenting.

I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today's decision. The Court's holding that the Constitution requires States to select Representatives either by elections at large or by elections in districts composed "as nearly as is practicable" of equal population places in jeopardy the seats of almost all the members of the present House of Representatives.

In the last congressional election, in 1962, Representatives from 42 States were elected from congressional districts.[1] In all but five of those States, the difference be-

*Georgia Laws, Sept.–Oct. 1962, Extra. Sess. 7–31.

[1] Representatives were elected at large in Alabama (8), Alaska (1), Delaware (1), Hawaii (2), Nevada (1), New Mexico (2), Vermont (1), and Wyoming (1). In addition, Connecticut, Maryland, Michigan, Ohio, and Texas each elected one of their Representatives at large.

tween the populations of the largest and smallest districts exceeded 100,000 persons.[2] A difference of this magnitude in the size of districts the average population of which in each State is less than 500,000[3] is presumably not equality among districts "as nearly as is practicable," although the Court does not reveal its definition of that phrase.[4] Thus, today's decision impugns the validity of the election of 398 Representatives from 37 States, leaving a "constitutional" House of 37 members now sitting.[5]

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[2] The five States are Iowa, Maine, New Hampshire, North Dakota, and Rhode Island. Together, they elect 15 Representatives.

The populations of the largest and smallest districts in each State and the difference between them are contained in an Appendix to this opinion.

[3] The only State in which the average population per district is greater than 500,000 is Connecticut, where the average population per district is 507,047 (one Representative being elected at large). The difference between the largest and smallest districts in Connecticut is, however, 370,613.

[4] The Court's "as nearly as is practicable" formula sweeps a host of questions under the rug. How great a difference between the populations of various districts within a State is tolerable? Is the standard an absolute or relative one, and if the latter to what is the difference in population to be related? Does the number of districts within the State have any relevance? Is the number of voters or the number of inhabitants controlling? Is the relevant statistic the greatest disparity between any two districts in the State or the average departure from the average population per district, or a little of both? May the State consider factors such as area or natural boundaries (rivers, mountain ranges) which are plainly relevant to the practicability of effective representation?

There is an obvious lack of criteria for answering questions such as these, which points up the impropriety of the Court's wholehearted but heavy-footed entrance into the political arena.

[5] The 37 "constitutional" Representatives are those coming from the eight States which elected their Representatives at large (plus one each elected at large in Connecticut, Maryland, Michigan, Ohio, and Texas) and those coming from States in which the difference between the populations of the largest and smallest districts was less

Only a demonstration which could not be avoided would justify this Court in rendering a decision the effect of which, inescapably as I see it, is to declare constitutionally defective the very composition of a coordinate branch of the Federal Government. The Court's opinion not only fails to make such a demonstration, it is unsound logically on its face and demonstrably unsound historically.

I.

Before coming to grips with the reasoning that carries such extraordinary consequences, it is important to have firmly in mind the provisions of Article I of the Constitution which control this case:

> "Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
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> . . . . . .

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than 100,000. See notes 1 and 2, *supra*. Since the difference between the largest and smallest districts in Iowa is 89,250, and the average population per district in Iowa is only 393,934, Iowa's 7 Representatives might well lose their seats as well. This would leave a House of Representatives composed of the 22 Representatives elected at large plus eight elected in congressional districts.

These conclusions presume that all the Representatives from a State in which any part of the congressional districting is found invalid would be affected. Some of them, of course, would ordinarily come from districts the populations of which were about that which would result from an apportionment based solely on population. But a court cannot erase only the districts which do not conform to the standard announced today, since invalidation of those districts would require that the lines of all the districts within the State be redrawn. In the absence of a reapportionment, *all* the Representatives from a State found to have violated the standard would presumably have to be elected at large.

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . .

"Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

. . . . . .

"Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

As will be shown, these constitutional provisions and their "historical context," *ante*, p. 7, establish:

1. that congressional Representatives are to be apportioned among the several States largely, but not entirely, according to population;

2. that the States have plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress; and

3. that the supervisory power of Congress is exclusive.

In short, in the absence of legislation providing for equal districts by the Georgia Legislature or by Congress, these appellants have no right to the judicial relief which they seek. It goes without saying that it is beyond the province of this Court to decide whether equally populated districts is the preferable method for electing Representatives, whether state legislatures would have acted more fairly or wisely had they adopted such a method, or whether Congress has been derelict in not requiring state legislatures to follow that course. Once it is clear that there is no *constitutional* right at stake, that ends the case.

II.

Disclaiming all reliance on other provisions of the Constitution, in particular those of the Fourteenth Amendment on which the appellants relied below and in this Court, the Court holds that the provision in Art. I, § 2, for election of Representatives "by the People" *means* that congressional districts are to be "as nearly as is practicable" equal in population, *ante*, pp. 7–8. Stripped of rhetoric and a "historical context," *ante*, p. 7, which bears little resemblance to the evidence found in the pages of history, see *infra*, pp. 30–41, the Court's opinion supports its holding only with the bland assertion that "the principle of a House of Representatives elected 'by the People' " would be "cast aside" if "a vote is worth more in one district than in another," *ante*, p. 8, *i. e.*, if congressional districts within a State, each electing a single Representative, are not equal in population. The fact is, however, that Georgia's 10 Representatives *are* elected "by the People" of Georgia, just as Representatives from other States are elected "by the People of the several States." This is all that the Constitution requires.[6]

[6] Since I believe that the Constitution expressly provides that state legislatures and the Congress shall have exclusive jurisdiction

Although the Court finds necessity for its artificial construction of Article I in the undoubted importance of the right to vote, that right is not involved in this case. All of the appellants do vote. The Court's talk about "debasement" and "dilution" of the vote is a model of circular reasoning, in which the premises of the argument feed on the conclusion. Moreover, by focusing exclusively on numbers in disregard of the area and shape of a congressional district as well as party affiliations within the district, the Court deals in abstractions which will be recognized even by the politically unsophisticated to have little relevance to the realities of political life.

In any event, the very sentence of Art. I, § 2, on which the Court exclusively relies confers the right to vote for Representatives only on those whom *the State* has found qualified to vote for members of "the most numerous Branch of the State Legislature." *Supra*, p. 22. So far as Article I is concerned, it is within the State's power to confer that right only on persons of wealth or of a particular sex or, if the State chose, living in specified areas of the State.[7] Were Georgia to find the residents of the

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over problems of congressional apportionment of the kind involved in this case, there is no occasion for me to consider whether, in the absence of such provision, other provisions of the Constitution, relied on by the appellants, would confer on them the rights which they assert.

[7] Although it was held in *Ex parte Yarbrough*, 110 U. S. 651, and subsequent cases, that the right to vote for a member of Congress depends on the Constitution, the opinion noted that the legislatures of the States prescribe the qualifications for electors of the legislatures and thereby for electors of the House of Representatives. 110 U. S., at 663. See *ante*, p. 17, and *infra*, pp. 45–46.

The States which ratified the Constitution exercised their power. A property or taxpaying qualification was in effect almost everywhere. See, *e. g.*, the New York Constitution of 1777, Art. VII, which restricted the vote to freeholders "possessing a freehold of the value of twenty pounds, . . . or [who] have rented a tenement . . . of the

Fifth District unqualified to vote for Representatives to the State House of Representatives, they could not vote for Representatives to Congress, according to the express words of Art. I, § 2. Other provisions of the Constitution would, of course, be relevant, *but, so far as Art. I, § 2, is concerned,* the disqualification would be within Georgia's power. How can it be, then, that this very same sentence prevents Georgia from apportioning its Representatives as it chooses? The truth is that it does not.

The Court purports to find support for its position in the third paragraph of Art. I, § 2, which provides for the apportionment of Representatives among the States. The appearance of support in that section derives from the Court's confusion of two issues: direct election of Representatives within the States and the apportionment of Representatives among the States. Those issues are distinct, and were separately treated in the Constitution. The fallacy of the Court's reasoning in this regard is illustrated by its slide, obscured by intervening discussion (see *ante,* pp. 13–14), from the intention of the delegates at the Philadelphia Convention "that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants," *ante,* p. 13, to a "principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people," *ante,* p. 14. The delegates did have the former intention and made clear

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yearly value of forty shillings, and been rated and actually paid taxes to this State." The constitutional and statutory qualifications for electors in the various States are set out in tabular form in 1 Thorpe, A Constitutional History of the American People 1776–1850 (1898), 93–96. The progressive elimination of the property qualification is described in Sait, American Parties and Elections (Penniman ed., 1952), 16–17. At the time of the Revolution, "no serious inroads had yet been made upon the privileges of property, which, indeed, maintained in most states a second line of defense in the

provision for it.[8] Although many, perhaps most, of them also believed generally—but assuredly not in the precise, formalistic way of the majority of the Court[9]—that within the States representation should be based on population, they did not surreptitiously slip their belief into the Constitution in the phrase "by the People," to be discovered 175 years later like a Shakespearian anagram.

Far from supporting the Court, the apportionment of Representatives among the States shows how blindly the Court has marched to its decision. Representatives were to be apportioned among the States on the basis of free population plus three-fifths of the slave population. Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says it prohibited: it "weighted" the vote of voters in the slave States. Alternatively, it might have been thought that Representatives elected by free men of a State would speak also for the slaves. But since the slaves added to the representation only of their own State, Representa-

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form of high personal-property qualifications required for membership in the legislature." *Id.*, at 16 (footnote omitted).

Women were not allowed to vote. Thorpe, *op. cit., supra,* 93–96. See generally Sait, *op. cit., supra,* 49–54. New Jersey apparently allowed women, as "inhabitants," to vote until 1807. See Thorpe, *op. cit., supra,* 93. Compare N. J. Const., 1776, Art. XIII, with N. J. Const., 1844, Art. II, ¶ 1.

[8] Even that is not strictly true unless the word "solely" is deleted. The "three-fifths compromise" was a departure from the principle of representation according to the number of inhabitants of a State. Cf. The Federalist, No. 54, discussed *infra,* pp. 39–40. A more obvious departure was the provision that each State shall have a Representative regardless of its population. See *infra,* pp. 28–29.

[9] The fact that the delegates were able to agree on a Senate composed entirely without regard to population and on the departures from a population-based House, mentioned in note 8, *supra,* indicates

tives from the slave States could have been thought to speak only for the slaves of their own States, indicating both that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group and that Representatives were in large degree still thought of as speaking for the whole population *of a State.*[10]

There is a further basis for demonstrating the hollowness of the Court's assertion that Article I requires "one man's vote in a congressional election . . . to be worth as much as another's," *ante,* p. 8. Nothing that the Court does today will disturb the fact that although in 1960 the population of an average congressional district was 410,481,[11] the States of Alaska, Nevada, and Wyo-

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that they recognized the possibility that alternative principles combined with political reality might dictate conclusions inconsistent with an abstract principle of absolute numerical equality.

On the apportionment of the state legislatures at the time of the Constitutional Convention, see Luce, Legislative Principles (1930), 331–364; Hacker, Congressional Districting (1963), 5.

[10] It is surely beyond debate that the Constitution did not require the slave States to apportion their Representatives according to the dispersion of slaves within their borders. The above implications of the three-fifths compromise were recognized by Madison. See The Federalist, No. 54, discussed *infra,* pp. 39–40.

Luce points to the "quite arbitrary grant of representation proportionate to three fifths of the number of slaves" as evidence that even in the House "the representation of men as men" was not intended. He states: "There can be no shadow of question that populations were accepted as a measure of material interests—landed, agricultural, industrial, commercial, in short, property." Legislative Principles (1930), 356–357.

[11] U. S. Bureau of the Census, Census of Population: 1960 (hereafter, Census), xiv. The figure is obtained by dividing the population base (which excludes the population of the District of Columbia, the population of the Territories, and the number of Indians not taxed) by the number of Representatives. In 1960, the population base was 178,559,217, and the number of Representatives was 435.

ming each have a Representative in Congress, although their respective populations are 226,167, 285,278, and 330,066.[12] In entire disregard of population, Art. I, § 2, guarantees each of these States and every other State "at Least one Representative." It is whimsical to assert in the face of this guarantee that an absolute principle of "equal representation in the House for equal numbers of people" is "solemnly embodied" in Article I. All that there is is a provision which bases representation in the House, generally but not entirely, on the population of the States. The provision for representation of *each State* in the House of Representatives is not a mere exception to the principle framed by the majority; it shows that no such principle is to be found.

Finally in this array of hurdles to its decision which the Court surmounts only by knocking them down is § 4 of Art. I which states simply:

> "The Times, Places and *Manner* of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." (Emphasis added.)

The delegates were well aware of the problem of "rotten boroughs," as material cited by the Court, *ante*, pp. 14–15, and hereafter makes plain. It cannot be supposed that delegates to the Convention would have labored to establish a principle of equal representation only to bury it, one would have thought beyond discovery, in § 2, and omit all mention of it from § 4, which deals explicitly with the conduct of elections. Section 4 states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and, equally without qualification, that Congress may make or

[12] Census, 1–16.

alter such regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power. The Court's holding is, of course, derogatory not only of the power of the state legislatures but also of the power of Congress, both theoretically and as they have actually exercised their power. See *infra*, pp. 42–45.[13] It freezes upon both, for no reason other than that it seems wise to the majority of the present Court, a particular political theory for the selection of Representatives.

III.

There is dubious propriety in turning to the "historical context" of constitutional provisions which speak so consistently and plainly. But, as one might expect when the Constitution itself is free from ambiguity, the surrounding history makes what is already clear even clearer.

As the Court repeatedly emphasizes, delegates to the Philadelphia Convention frequently expressed their view that representation should be based on population. There were also, however, many statements favoring limited monarchy and property qualifications for suffrage and expressions of disapproval for unrestricted democracy.[14] Such expressions prove as little on one side of this case as they do on the other. Whatever the dominant political philosophy at the Convention, one thing seems clear: it is in the last degree unlikely that most or even many of the delegates would have subscribed to the

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[13] Section 5 of Article I, which provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members," also points away from the Court's conclusion. This provision reinforces the evident constitutional scheme of leaving to the Congress the protection of federal interests involved in the selection of members of the Congress.

[14] I Farrand, Records of the Federal Convention (1911) (hereafter Farrand), 48, 86–87, 134–136, 288–289, 299, 533, 534; II Farrand 202.

principle of "one person, one vote," *ante*, p. 18.[15] Moreover, the statements approving population-based representation were focused on the problem of how representation should be apportioned among the States in the House of Representatives. The Great Compromise concerned representation *of the States* in the Congress. In all of the discussion surrounding the basis of representation of the House and all of the discussion whether Representatives should be elected by the legislatures or the people of the States, there is nothing which suggests

[15] "The assemblage at the Philadelphia Convention was by no means committed to popular government, and few of the delegates had sympathy for the habits or institutions of democracy. Indeed, most of them interpreted democracy as mob rule and assumed that equality of representation would permit the spokesmen for the common man to outvote the beleaguered deputies of the uncommon man." Hacker, Congressional Districting (1963), 7–8. See Luce, Legislative Principles (1930), 356–357. With respect to apportionment of the House, Luce states: "Property was the basis, not humanity." *Id.*, at 357.

Contrary to the Court's statement, *ante*, p. 18, no reader of The Federalist "could have fairly taken . . . [it] to mean" that the Constitutional Convention had adopted a principle of "one person, one vote" in contravention of the qualifications for electors which the States imposed. In No. 54, Madison said: "It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a fœderal rule founded on the aggregate number of inhabitants, *so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate.* . . . In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Fœderal Constitution apportions the representatives." (Cooke ed. 1961) 369. (Italics added.) The passage from which the Court quotes, *ante*, p. 18, concludes with the following, overlooked by the Court: "They [the electors] are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State." *Id.*, at 385.

even remotely that the delegates had in mind the problem of districting within a State.[16]

The subject of districting within the States is discussed explicitly with reference to the provisions of Art. I, § 4, which the Court so pointedly neglects. The Court states: "The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives." *Ante*, p. 15. The remarks of Madison cited by the Court are as follows:

> "The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, [*sic*] This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; *these & many other points would depend on the Legislatures.* [*sic*] and might materially affect the appointments.

[16] References to Old Sarum (*ante*, p. 15), for example, occurred during the debate on the method of apportionment of Representatives *among* the States. I Farrand 449–450, 457.

> Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. *What danger could there be in giving a controuling power to the Natl. Legislature?*" [17] (Emphasis added.)

These remarks of Madison were in response to a proposal to strike out the provision for congressional supervisory power over the regulation of elections in Art. I, § 4. Supported by others at the Convention,[18] and not contradicted in any respect, they indicate as clearly as may be that the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress. How, then, can the Court hold that Art. I, § 2, prevents the state legislatures from districting as they choose? If the Court were correct, Madison's remarks would have been pointless. One would expect, at the very least, some reference to Art. I, § 2, as a limiting factor on the States. This is the "historical context" which the Convention debates provide.

Materials supplementary to the debates are as unequivocal. In the ratifying conventions, there was no suggestion that the provisions of Art. I, § 2, restricted the power of the States to prescribe the conduct of elections conferred on them by Art. I, § 4. None of the Court's ref-

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[17] II Farrand 240–241.

[18] *Ibid.*

erences to the ratification debates supports the view that the provision for election of Representatives "by the People" was intended to have any application to the apportionment of Representatives within the States; in each instance, the cited passage merely repeats what the Constitution itself provides: that Representatives were to be elected by the people of the States.[19]

In sharp contrast to this unanimous silence on the issue of this case when Art. I, § 2, was being discussed, there are repeated references to apportionment and related problems affecting the States' selection of Representatives in connection with Art. I, § 4. The debates in the ratifying conventions, as clearly as Madison's statement at the Philadelphia Convention, *supra*, pp. 32–33, indicate that under § 4, the state legislatures, subject only to the ultimate control of Congress, could district as they chose.

At the Massachusetts convention, Judge Dana approved § 4 because it gave Congress power to prevent a state legislature from copying Great Britain, where "a borough of but two or three cottages has a right to send two representatives to *Parliament*, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one." [20] He noted that the Rhode Island Legislature was "about adopting" a plan which would

[19] See the materials cited in notes 41–42, 44–45 of the Court's opinion, *ante*, p. 16. Ames' remark at the Massachusetts convention is typical: "The representatives are to represent the people." II Elliot's Debates on the Federal Constitution (2d ed. 1836) (hereafter Elliot's Debates), 11. In the South Carolina Convention, Pinckney stated that the House would "be so chosen as to represent in due proportion the people of the Union . . . ." IV Elliot's Debates 257. But he had in mind only that other clear provision of the Constitution that representation would be apportioned *among* the States according to population. None of his remarks bears on apportionment *within* the States. *Id.*, at 256–257.

[20] II Elliot's Debates 49.

"deprive the towns of Newport and Providence of their weight." [21] Mr. King noted the situation in Connecticut, where "Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations," and in South Carolina: "The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation but the members from Charleston, having the balance so much in their favor, will not consent to an alteration, and we see that the delegates from Carolina in Congress have always been chosen by the delegates of that city." [22] King stated that the power of Congress under § 4 was necessary to "control in this case"; otherwise, he said, "The representatives . . . from that state [South Carolina], will not be chosen *by the people,* but will be the representatives of a faction of that state." [23]

Mr. Parsons was as explicit.

> "Mr. PARSONS contended for vesting in Congress the powers contained in the 4th section [of Art. I], not only as those powers were necessary for preserving the union, but also for securing to the people their equal rights of election. . . . [State legislatures] might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore

[21] *Ibid.*

[22] *Id.,* at 50–51.

[23] *Id.,* at 51.

> to the people their equal and sacred rights of election. Perhaps it then will be objected, that from the supposed opposition of interests in the federal legislature, they may never agree upon any regulations; but regulations necessary for the interests of the people can never be opposed to the interests of either of the branches of the federal legislature; because that the interests of the people require that the mutual powers of that legislature should be preserved unimpaired, in order to balance the government. Indeed, if the Congress could never agree on any regulations, then certainly no objection to the 4th section can remain; for *the regulations introduced by the state legislatures will be the governing rule of elections, until Congress can agree upon alterations.*" [24] (Emphasis added.)

In the New York convention, during the discussion of § 4, Mr. Jones objected to congressional power to regulate elections because such power "might be so construed as to deprive the states of an essential right, which, in the true design of the Constitution, was to be reserved to them." [25] He proposed a resolution explaining that Congress had such power only if a state legislature neglected or refused or was unable to regulate elections itself.[26] Mr. Smith proposed to add to the resolution ". . . that each state shall be divided into as many districts as the representatives it is entitled to, and that each representative shall be chosen by a majority of votes." [27] He stated that his proposal was designed to prevent elections at large, which might result in all the representatives being "taken from a small part of the state." [28]

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[24] *Id.*, at 26–27.
[25] *Id.*, at 325.
[26] *Id.*, at 325–326.
[27] *Id.*, at 327.
[28] *Ibid.*

He explained further that his proposal was not intended to impose a requirement on the other States but "to enable the states to act their discretion, without the control of Congress." [29] After further discussion of districting, the proposed resolution was modified to read as follows:

> "[Resolved] . . . that nothing in this Constitution shall be construed to prevent the legislature of any state to pass laws, from time to time, to divide such state into as many convenient districts as the state shall be entitled to elect representatives for Congress, nor to prevent such legislature from making provision, that the electors in each district shall choose a citizen of the United States, who shall have been an inhabitant of the district, for the term of one year immediately preceding the time of his election, for one of the representatives of such state." [30]

Despite this careful, advertent attention to the problem of congressional districting, Art. I, § 2, was never mentioned. Equally significant is the fact that the proposed resolution expressly empowering the States to establish congressional districts contains no mention of a requirement that the districts be equal in population.

In the Virginia convention, during the discussion of § 4, Madison again stated unequivocally that he looked solely to that section to prevent unequal districting:

> ". . . [I]t was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charles-

[29] *Id.*, at 328.

[30] *Id.*, at 329.

> ton, which is represented by thirty members. Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government. *It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.* And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution." [31] (Emphasis added.)

Despite the apparent fear that § 4 would be abused, no one suggested that it could safely be deleted because § 2 made it unnecessary.

In the North Carolina convention, again during discussion of § 4, Mr. Steele pointed out that the state legislatures had the initial power to regulate elections, and that the North Carolina legislature would regulate the first election at least "as they think proper." [32] Respond-

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[31] III Elliot's Debates 367.

[32] IV Elliot's Debates 71.

ing to the suggestion that *the Congress* would favor the seacoast, he asserted that the courts would not uphold nor the people obey "laws inconsistent with the Constitution." [33] (The particular possibilities that Steele had in mind were apparently that Congress might attempt to prescribe the qualifications for electors or "to make the place of elections inconvenient." [34]) Steele was concerned with the danger of *congressional* usurpation, under the authority of § 4, of power *belonging to the States.* Section 2 was not mentioned.

In the Pennsylvania convention, James Wilson described Art. I, § 4, as placing "into the hands of the state legislatures" the power to regulate elections, but retaining for Congress "self-preserving power" to make regulations lest "the general government . . . lie prostrate at the mercy of the legislatures of the several states." [35] Without such power, Wilson stated, the state governments might "make improper regulations" or "make no regulations at all." [36] Section 2 was not mentioned.

Neither of the numbers of The Federalist from which the Court quotes, *ante*, pp. 15, 18, fairly supports its holding. In No. 57, Madison merely stated his assumption that Philadelphia's population would entitle it to two Representatives in answering the argument that congressional constituencies would be too large for good government.[37] In No. 54, he discussed the inclusion of slaves in the basis of apportionment. He said: "It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation." [38] This statement was offered simply to show that the slave

[33] *Ibid.*
[34] *Ibid.*
[35] II Elliot's Debates 440–441.
[36] *Id.*, at 441.
[37] The Federalist, No. 57 (Cooke ed. 1961), 389.
[38] *Id.*, at 368.

population could not reasonably be included in the basis of apportionment of direct taxes and excluded from the basis of apportionment of representation. Further on in the same number of The Federalist, Madison pointed out the fundamental cleavage which Article I made between apportionment of Representatives among the States and the selection of Representatives within each State:

> "It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a fœderal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. The qualifications on which the right of suffrage depend, are not perhaps the same in any two States. In some of the States the difference is very material. In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Fœderal Constitution apportions the representatives. In this point of view, the southern States might retort the complaint, by insisting, that the principle laid down by the Convention required that no regard should be had to the policy of particular States towards their own inhabitants; and consequently, that the slaves as inhabitants should have been admitted into the census according to their full number, in like manner with other inhabitants, who by the policy of other States, are not admitted to all the rights of citizens."[39]

In The Federalist, No. 59, Hamilton discussed the provision of § 4 for regulation of elections. He justified Congress' power with the "plain proposition, that *every*

[39] *Id.*, at 369.

government ought to contain in itself the means of its own preservation." [40] Further on, he said:

> "It will not be alledged that an election law could have been framed and inserted into the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. *It will, I presume, be as readily conceded, that there were only three ways, in which this power could have been reasonably modified and disposed, that it must either have been lodged wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former. The last mode has with reason been preferred by the Convention.* They have submitted the regulation of elections for the Fœderal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, *whenever extraordinary circumstances might render that interposition necessary to its safety.*" [41] (Emphasis added.)

Thus, in the number of The Federalist which does discuss the regulation of elections, the view is unequivocally stated that the state legislatures have plenary power over the conduct of congressional elections subject only to such regulations as Congress itself might provide.

The upshot of all this is that the language of Art. I, §§ 2 and 4, the surrounding text, and the relevant history

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[40] *Id.*, at 398.

[41] *Id.*, at 398–399.

are all in strong and consistent direct contradiction of the Court's holding. The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power. Within this scheme, the appellants do not have the right which they assert, in the absence of provision for equal districts by the Georgia Legislature or the Congress. The constitutional right which the Court creates is manufactured out of whole cloth.

IV.

The unstated premise of the Court's conclusion quite obviously is that the Congress has not dealt, and the Court believes it will not deal, with the problem of congressional apportionment in accordance with what the Court believes to be sound political principles. Laying aside for the moment the validity of such a consideration as a factor in constitutional interpretation, it becomes relevant to examine the history of congressional action under Art. I, § 4. This history reveals that the Court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment.

Congress exercised its power to regulate elections for the House of Representatives for the first time in 1842, when it provided that Representatives from States "entitled to more than one Representative" should be elected by districts of contiguous territory, "no one district electing more than one Representative." [42] The requirement was later dropped,[43] and reinstated.[44] In 1872, Congress required that Representatives "be elected by districts composed of contiguous territory, and containing as

[42] Act of June 25, 1842, § 2, 5 Stat. 491.

[43] Act of May 23, 1850, 9 Stat. 428.

[44] Act of July 14, 1862, 12 Stat. 572.

nearly as practicable an equal number of inhabitants, . . . no one district electing more than one Representative." [45] This provision for equal districts which the Court exactly duplicates in effect, was carried forward in each subsequent apportionment statute through 1911.[46] There was no reapportionment following the 1920 census. The provision for equally populated districts was dropped in 1929,[47] and has not been revived, although the 1929 provisions for apportionment have twice been amended and, in 1941, were made generally applicable to subsequent censuses and apportionments.[48]

The legislative history of the 1929 Act is carefully reviewed in *Wood* v. *Broom*, 287 U. S. 1. As there stated:

> "It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929.
>
> "This appears from the terms of the act, and its legislative history shows that the omission was deliberate. The question was up, and considered." 287 U. S., at 7.

Although there is little discussion of the reasons for omitting the requirement of equally populated districts, the fact that such a provision was included in the bill as it was presented to the House,[49] and was deleted by the House after debate and notice of intention to do so,[50]

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[45] Act of Feb. 2, 1872, § 2, 17 Stat. 28.

[46] Act of Feb. 25, 1882, § 3, 22 Stat. 5, 6; Act of Feb. 7, 1891, § 3, 26 Stat. 735; Act of Jan. 16, 1901, § 3, 31 Stat. 733, 734; Act of Aug. 8, 1911, § 3, 37 Stat. 13, 14.

[47] Act of June 18, 1929, 46 Stat. 21.

[48] Act of Apr. 25, 1940, 54 Stat. 162; Act of Nov. 15, 1941, 55 Stat. 761.

[49] H. R. 11725, 70th Cong., 1st Sess., introduced on Mar. 3, 1928, 69 Cong. Rec. 4054.

[50] 70 Cong. Rec. 1499, 1584, 1602, 1604.

leaves no doubt that the omission was deliberate. The likely explanation for the omission is suggested by a remark on the floor of the House that "the States ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have." [51]

Debates over apportionment in subsequent Congresses are generally unhelpful to explain the continued rejection of such a requirement; there are some intimations that the feeling that districting was a matter exclusively for the States persisted.[52] Bills which would have imposed on the States a requirement of equally or nearly equally populated districts were regularly introduced in the House.[53] None of them became law.

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[51] 70 Cong. Rec. 1499 (remarks of Mr. Dickinson). The Congressional Record reports that this statement was followed by applause. At another point in the debates, Representative Lozier stated that Congress lacked "power to determine in what manner the several States exercise their sovereign rights in selecting their Representatives in Congress . . . ." 70 Cong. Rec. 1496. See also the remarks of Mr. Graham. *Ibid.*

[52] See, *e. g.*, 86 Cong. Rec. 4368 (remarks of Mr. Rankin), 4369 (remarks of Mr. McLeod), 4371 (remarks of Mr. McLeod); 87 Cong. Rec. 1081 (remarks of Mr. Moser).

[53] H. R. 4820, 76th Cong., 1st Sess.; H. R. 5099, 76th Cong., 1st Sess.; H. R. 2648, 82d Cong., 1st Sess.; H. R. 6428, 83d Cong., 1st Sess.; H. R. 111, 85th Cong., 1st Sess.; H. R. 814, 85th Cong., 1st Sess.; H. R. 8266, 86th Cong., 1st Sess.; H. R. 73, 86th Cong., 1st Sess.; H. R. 575, 86th Cong., 1st Sess.; H. R. 841; 87th Cong., 1st Sess.

Typical of recent proposed legislation is H. R. 841, 87th Cong., 1st Sess., which amends 2 U. S. C. § 2a to provide:

"(c) Each State entitled to more than one Representative in Congress under the apportionment provided in subsection (a) of this section, shall establish for each Representative a district composed of contiguous and compact territory, and the number of inhabitants contained within any district so established shall not vary more than 10 per centum from the number obtained by dividing the total population of such States, as established in the last decennial

For a period of about 50 years, therefore, Congress, by repeated legislative act, imposed on the States the requirement that congressional districts be equal in population. (This, of course, is the very requirement which the Court now declares to have been constitutionally required of the States all along without implementing legislation.) Subsequently, after giving express attention to the problem, Congress eliminated that requirement, with the intention of permitting the States to find their own solutions. Since then, despite repeated efforts to obtain congressional action again, Congress has continued to leave the problem and its solution to the States. It cannot be contended, therefore, that the Court's decision today fills a gap left by the Congress. On the contrary, the Court substitutes its own judgment for that of the Congress.

V.

The extent to which the Court departs from accepted principles of adjudication is further evidenced by the irrelevance to today's issue of the cases on which the Court relies.

Ex parte Yarbrough, 110 U. S. 651, was a *habeas corpus* proceeding, in which the Court sustained the validity of a conviction of a group of persons charged with violating federal statutes [54] which made it a crime to conspire to deprive a citizen of his federal rights, and in particular the *right to vote*. The issue before the Court was whether or not the Congress had power to pass laws pro-

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census, by the number of Representatives apportioned to such State under the provisions of subsection (a) of this section.

"(d) Any Representative elected to the Congress from a district which does not conform to the requirements set forth in subsection (c) of this section shall be denied his seat in the House of Representatives and the Clerk of the House shall refuse his credentials."

Similar bills introduced in the current Congress are H. R. 1128, H. R. 2836, H. R. 4340, and H. R. 7343, 88th Cong., 1st Sess.

[54] R. S. § 5508; R. S. § 5520.

tecting the right to vote for a member of Congress from fraud and violence; the Court relied expressly on Art. I, § 4, in sustaining this power. *Id.*, at 660. Only in this context, in order to establish that the right to vote in a congressional election was a right protected by federal law, did the Court hold that the right was dependent on the Constitution and not on the law of the States. Indeed, the Court recognized that the Constitution "adopts the qualification" furnished by the States "as the qualification of its own electors for members of Congress." *Id.*, at 663. Each of the other three cases cited by the Court, *ante*, p. 17, similarly involved acts which were prosecuted as violations of federal statutes. The acts in question were filing false election returns, *United States* v. *Mosley*, 238 U. S. 383, alteration of ballots and false certification of votes, *United States* v. *Classic*, 313 U. S. 299, and stuffing the ballot box, *United States* v. *Saylor*, 322 U. S. 385. None of those cases has the slightest bearing on the present situation.[55]

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[55] *Smiley* v. *Holm*, 285 U. S. 355, and its two companion cases, *Koenig* v. *Flynn*, 285 U. S. 375; *Carroll* v. *Becker*, 285 U. S. 380, on which my Brother CLARK relies in his separate opinion, *ante*, pp. 18–19, are equally irrelevant. *Smiley* v. *Holm* presented two questions: the first, answered in the negative, was whether the provision in Art. I, § 4, which empowered the "Legislature" of a State to prescribe the regulations for congressional elections meant that a State could not by law provide for a Governor's veto over such regulations as had been prescribed by the legislature. The second question, which concerned two congressional apportionment measures, was whether the Act of June 18, 1929, 46 Stat. 21, had repealed certain provisions of the Act of Aug. 8, 1911, 37 Stat. 13. In answering this question, the Court was concerned to *carry out the intention of Congress in enacting the 1929 Act*. See *id.*, at 374. Quite obviously, therefore, *Smiley* v. *Holm* does *not* stand for the proposition which my Brother CLARK derives from it. There was not the slightest intimation in that case that Congress' power to prescribe regulations for elections was subject to judicial scrutiny, *ante*, p. 18, such that this Court could itself prescribe regulations for congressional elec-

The Court gives scant attention, and that not on the merits, to *Colegrove* v. *Green,* 328 U. S. 549, which is directly in point; the Court there affirmed dismissal of a complaint alleging that "by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901 . . . lacked compactness of territory and approximate equality of population." *Id.,* at 550–551. Leaving to another day the question of what *Baker* v. *Carr,* 369 U. S. 186, did actually decide, it can hardly be maintained on the authority of *Baker* or anything else, that the Court does not today invalidate Mr. Justice Frankfurter's eminently correct statement in *Colegrove* that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House . . . . If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people." 328 U. S., at 554. The problem was described by Mr. Justice Frankfurter as "an aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution . . . ." *Ibid.* Mr. Justice Frankfurter did not, of course, speak for a majority of the Court in *Colegrove;* but refusal for that reason to give the opinion precedential effect does not justify refusal to give appropriate attention to the views there expressed.[56]

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tions in disregard and even in contradiction of congressional purpose. The companion cases to *Smiley* v. *Holm* presented no different issues and were decided wholly on the basis of the decision in that case.

[56] The Court relies in part on *Baker* v. *Carr, supra,* to immunize its present decision from the force of *Colegrove.* But nothing in *Baker* is contradictory to the view that, political question and other objections to "justiciability" aside, the Constitution vests exclusive authority to deal with the problem of this case in the state legislatures and the Congress.

VI.

Today's decision has portents for our society and the Court itself which should be recognized. This is not a case in which the Court vindicates the kind of individual rights that are assured by the Due Process Clause of the Fourteenth Amendment, whose "vague contours," *Rochin* v. *California*, 342 U. S. 165, 170, of course leave much room for constitutional developments necessitated by changing conditions in a dynamic society. Nor is this a case in which an emergent set of facts requires the Court to frame new principles to protect recognized constitutional rights. The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.

This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government.

Believing that the complaint fails to disclose a constitutional claim, I would affirm the judgment below dismissing the complaint.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN.*

*State and Number of Representatives***	*Largest District*	*Smallest District*	*Difference Between Largest and Smallest Districts*
Alabama (8)	.....	.....	.....
Alaska (1)	.....	.....	.....
Arizona (3)	663,510	198,236	465,274
Arkansas (4)	575,385	332,844	242,541
California (38)	588,933	301,872	287,061
Colorado (4)	653,954	195,551	458,403
Connecticut (6)	689,555	318,942	370,613
Delaware (1)	.....	.....	.....
Florida (12)	660,345	237,235	423,110
Georgia (10)	823,680	272,154	551,526
Hawaii (2)	.....	.....	.....
Idaho (2)	409,949	257,242	152,707
Illinois (24)	552,582	278,703	273,879
Indiana (11)	697,567	290,596	406,971
Iowa (7)	442,406	353,156	89,250
Kansas (5)	539,592	373,583	166,009
Kentucky (7)	610,947	350,839	260,108
Louisiana (8)	536,029	263,850	272,179
Maine (2)	505,465	463,800	41,665
Maryland (8)	711,045	243,570	467,475
Massachusetts (12)	478,962	376,336	102,626
Michigan (19)	802,994	177,431	625,563
Minnesota (8)	482,872	375,475	107,397
Mississippi (5)	608,441	295,072	313,369

*The populations of the districts are based on the 1960 Census. The districts are those used in the election of the current 88th Congress. The populations of the districts are available in the biographical section of the Congressional Directory, 88th Cong., 2d Sess.

**435 in all.

State and Number of Representatives	*Largest District*	*Smallest District*	*Difference Between Largest and Smallest Districts*
Missouri (10)	506,854	378,499	128,355
Montana (2)	400,573	274,194	126,379
Nebraska (3)	530,507	404,695	125,812
Nevada (1)	.....	.....	.....
New Hampshire (2)	331,818	275,103	56,715
New Jersey (15)	585,586	255,165	330,421
New Mexico (2)	.....	.....	.....
New York (41)	471,001	350,186	120,815
North Carolina (11)	491,461	277,861	213,600
North Dakota (2)	333,290	299,156	34,134
Ohio (24)	726,156	236,288	489,868
Oklahoma (6)	552,863	227,692	325,171
Oregon (4)	522,813	265,164	257,649
Pennsylvania (27)	553,154	303,026	250,128
Rhode Island (2)	459,706	399,782	59,924
South Carolina (6)	531,555	302,235	229,320
South Dakota (2)	497,669	182,845	314,824
Tennessee (9)	627,019	223,387	403,632
Texas (23)	951,527	216,371	735,156
Utah (2)	572,654	317,973	254,681
Vermont (1)	.....	.....	.....
Virginia (10)	539,618	312,890	226,728
Washington (7)	510,512	342,540	167,972
West Virginia (5)	422,046	303,098	118,948
Wisconsin (10)	530,316	236,870	293,446
Wyoming (1)	.....	.....	.....

MR. JUSTICE STEWART.

I think it is established that "this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable,"* and I cannot subscribe to any possible implication to the contrary which

*The quotation is from Mr. Justice Rutledge's concurring opinion in *Colegrove* v. *Green*, 328 U. S., at 565.

may lurk in MR. JUSTICE HARLAN's dissenting opinion. With this single qualification I join the dissent because I think MR. JUSTICE HARLAN has unanswerably demonstrated that Art. I, § 2, of the Constitution gives no mandate to this Court or to any court to ordain that congressional districts within each State must be equal in population.

WRIGHT ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 96. Argued November 19, 1963.—Decided February 17, 1964.

Appellants, voters in the four congressional districts in Manhattan Island, brought suit before a three-judge District Court challenging the constitutionality of part of New York's 1961 congressional apportionment statute. They charged that, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment, irregularly shaped districts were drawn with racial considerations in mind, resulting in one district which excluded non-white citizens and those of Puerto Rican origin, who were largely concentrated in one of the other districts. *Held:* Finding of District Court that appellants had failed to show that the challenged part of the apportionment act was a "state contrivance" to segregate on the basis of race or place of origin, that the New York Legislature was motivated by racial considerations or that, in fact, it drew the districts on racial lines was not clearly erroneous. Pp. 53–58.

(a) Where the evidence was "equally, or more, persuasive" that racial considerations had not motivated the State Legislature than that such considerations had motivated the Legislature, the findings of the District Court that the appellants had failed to prove their case will not be disturbed. Pp. 56–57.

(b) The high concentration in one area of colored and Puerto Rican voters made it difficult to draw districts to approximate an equal division of these groups among the districts, even assuming that to be permissible. P. 57.

211 F. Supp. 460, affirmed.

Justin N. Feldman argued the cause for appellants. With him on the briefs were *Jerome T. Orans* and *Elsie M. Quinlan.*

Irving Galt, Assistant Solicitor General of New York, and *Jawn A. Sandifer* argued the cause for appellees. With *Mr. Galt* on the brief for appellees Rockefeller et al.

were *Louis J. Lefkowitz,* Attorney General of New York, *Sheldon Raab,* Assistant Attorney General, and *Barry Mahoney,* Deputy Assistant Attorney General. *Mr. Sandifer* also filed a brief for appellees Powell et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellants, citizens and registered voters of New York's Seventeenth, Eighteenth, Nineteenth, and Twentieth Congressional Districts, all in New York County (the Island of Manhattan), brought this action in the United States District Court for the Southern District of New York challenging the constitutionality of that part of Chapter 980 of New York's 1961 congressional apportionment statute which defined these four districts.[1] The Governor and several other New York state officials were named as defendants. Congressman Adam Clayton Powell, who represents the Eighteenth Congressional District, and several other New York County political leaders were permitted to intervene as defendants supporting the constitutionality of the apportionment act. Appellants charged that the part of the New York Act in question deprived them of rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Fifteenth Amendment, which provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Their complaint alleged that:

> "Chapter 980 establishes irrational, discriminatory and unequal Congressional Districts in the County of New York and segregates eligible voters by race and place of origin. It is contrived to create one district, the 17th Congressional District, which excludes

[1] N. Y. State Law, § 111.

> non-white citizens and citizens of Puerto Rican origin and which is over-represented in comparison to the other three districts in the County of New York. The 18th, 19th and 20th Congressional Districts have been drawn so as to include the overwhelming number of non-white citizens and citizens of Puerto Rican origin in the County of New York and to be under-represented in relation to the 17th Congressional District." [2]

The case was heard by a District Court of three judges. During these hearings, counsel for appellants made it clear that their case did not depend on "under-representation because of the variation in the size of the Congressional districts"; it was rather, he said, "a case of ghettoizing the Island of Manhattan" so as "to create a white Congressional district and a non-white Congressional district." "I think," counsel said, "the only province of the Court in this area is to determine whether or not these districts have been created with racial considerations in mind, and, if they have, or if the results of this districting, the effect of the statute is to create racially segregated areas, we maintain that it violates the Fourteenth and Fifteenth Amendments." Appellants offered maps, statistics, and some oral evidence designed to prove their charge that it was impossible to have districts such as these were unless they "were drawn with regard to race." The statistics showed that the Eighteenth District contained 86.3% Negroes and Puerto Ricans; the Nineteenth, 28.5%; the Twentieth, 27.5%; and the Seventeenth, 5.1%. The evidence also showed irregularities in the boundaries of the districts and some varia-

[2] The complaint also stated that unconstitutional districting had existed for many years but that repeated efforts to bring about legislative correction had been of no avail, partly because of unconstitutional apportionment of the state legislature. Appellants did not offer proof to support these allegations, however.

tion in population among the four.[3] Appellees presented no oral testimony but did offer historical maps, a table from the Bureau of the Census, and a message from the President to the Congress on the subject of congressional apportionment.

A majority of the District Court found that appellants had not made out their case on the crucial factual issues.[4] Judge Moore broadly found that "[n]o proof was offered by any party that the specific boundaries created by Chapter 980 were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts."[5] He concluded, "Plaintiffs having failed upon the facts and the law to establish any violation of their constitutional rights as a result of the action of the New York Legislature in enacting Chapter 980 of the Laws of 1961, the complaint must be dismissed."[6] Judge Feinberg concurred in Judge Moore's result because he, too, believed that appellants had

> "not met their burden of proving that the boundaries of the new 17th, 18th, 19th, and 20th Congressional Districts were drawn along racial lines, as they allege. . . .
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> . . . . .
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> ". . . Plaintiffs did introduce evidence which might justify an inference that racial considerations motivated the 1961 reapportionment of congressional districts in Manhattan. However, other inferences, as set forth below, are equally or more justifiable. Plaintiffs have a difficult burden to meet in attack-

[3] The population of the Seventeenth Congressional District was 382,320; the Eighteenth, 431,330; the Nineteenth, 445,175; and the Twentieth, 439,456.

[4] 211 F. Supp. 460.

[5] *Id.*, at 462.

[6] *Id.*, at 468.

> ing the constitutionality of this state statute. . . . Upon analysis, I do not think that burden has been met.
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> . . . . . .
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> ". . . In short, based upon the entire record, I do not feel that plaintiffs have proved their case." [7]

Judge Murphy dissented. He viewed the evidence as "tantamount for all practical purposes, to a mathematical demonstration" that the legislation was "solely concerned with segregating" white voters from colored and Puerto Rican voters "by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)" and as establishing *"per se* a *prima facie* case of a legislative intent to draw congressional district lines in the 17th and 18th Districts on the basis of race and national origin." [8]

While a number of other matters have been discussed, we find it necessary to decide only the first question presented in the jurisdictional statement, namely "[w]hether appellants sustained their burden of proving that the portion of Chapter 980 . . . which delineates the boundaries of the Congressional districts in Manhattan Island segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment." We accept the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines. Compare *Gomillion* v. *Lightfoot*, 364 U. S. 339. It may be true, as Judge Feinberg thought, that there was evidence which could have supported inferences that racial considerations might have moved the

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[7] *Id.*, at 468, 469, 471.

[8] *Id.*, at 472–473.

state legislature, but, even if so, we agree that there also was evidence to support his finding that the contrary inference was "equally, or more, persuasive."[9] Where there are such conflicting inferences one group of them cannot, because labeled as "prima facie proof," be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences. And this is true whether the conflicting inferences are drawn from evidence offered by the plaintiff or by the defendant or by both. *Hernandez* v. *Texas*, 347 U. S. 475, does not support the dissenting view of Judge Murphy that appellants' evidence here established a prima facie case compelling the District Court, despite conflicting inferences which could be drawn from that evidence, to find that New York created these districts on the basis of race and place of origin. *Hernandez* followed the rule laid down in *Norris* v. *Alabama*, 294 U. S. 587, and other cases,[10] that proof of a long-continued state practice of not calling Negroes as jurors made out a prima facie case sufficient to justify, but not necessarily to compel, a finding of discrimination on account of race. The conclusion of racial discrimination in those cases was reached only after an appraisal of this practice along with all the circumstances. It is plain to us that the District Court was not compelled to find that these districts were the product of a state contrivance to discriminate against colored or Puerto Rican voters. As the majority below pointed out, the concentration of colored and Puerto Rican voters in one area in the county made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts.[11] Undoubtedly some of these voters, as shown by this lawsuit,

[9] *Id.*, at 471.

[10] *E. g.*, *Pierre* v. *Louisiana*, 306 U. S. 354, 361–362; *Smith* v. *Texas*, 311 U. S. 128, 130–131; *Hill* v. *Texas*, 316 U. S. 400, 404.

[11] 211 F. Supp., at 467–468 (Moore, J.), 471 (Feinberg, J.).

would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.

We accept the District Court's finding that appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin. That finding was crucial to appellants' case as they presented it, and for that reason their challenge cannot be sustained. We do not pass on the question which appellants have not presented here, that is, whether the state apportionment is constitutionally invalid because it may fail in its objective to create districts based as nearly as practicable on equal population.[12] See *Wesberry* v. *Sanders, ante,* p. 1. Since no such challenge has been urged here, the issues have not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question.

The judgment dismissing the complaint is

Affirmed.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court on the premise that the only issue in this case involves alleged racially segregated districts. The case is thus, in my opinion, governed by entirely different constitutional considerations, see *Gomillion* v. *Lightfoot,* 364 U. S. 339, than those which I believe

[12] The Committee of the New York Legislature which proposed the 1961 apportionment bill said in its report, "It is the conclusion of your Committee that the most important standard is substantial equality of population." McKinney's N. Y. Laws, 1961 (Second Extraordinary Session), 63, 64.

should govern in *Wesberry* v. *Sanders*, *ante*, p. 1, also decided today, in which I have filed a dissenting opinion, *ante*, p. 20.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE GOLDBERG concurs, dissenting.

This case raises a question kin to that in *Gomillion* v. *Lightfoot*, 364 U. S. 339, where racial gerrymandering was used to deprive Negroes of the right to vote. Here no Negroes are deprived of the franchise. Rather, zigzag, tortuous lines are drawn to concentrate Negroes and Puerto Ricans in Manhattan's Eighteenth Congressional District and practically to exclude them from the Seventeenth Congressional District. Neighborhoods in our larger cities often contain members of only one race; and those who draw the lines of Congressional Districts cannot be expected to disregard neighborhoods in an effort to make each district a multiracial one.[1] But where, as here, the line that is drawn can be explained only in racial terms, a different problem is presented.

I.

Manhattan is divided into four districts and as a result of the serpentine path that the lines follow, those districts reflect substantial, though not complete, segregation by races:

District	*White percent of district*	*Negro and Puerto Rican percent of district*
17th	94.9	5.1
18th	13.7	86.3
19th	71.5	28.5
20th	72.5	27.5

[1] Nor does the Constitution require a scheme for exact equality in districting, let alone a "mathematically-based procedure for districting which produces contiguous districts nearly equal in population." See Weaver and Hess, A Procedure for Nonpartisan Districting: Development of Computer Techniques, 73 Yale L. J. 288, 307 (1963).

In 1961 the legislature expanded the Seventeenth District by altering its boundaries in three respects: (1) it added an area on the upper East Side between 59th Street and 89th Street *of whose population Negroes and Puerto Ricans make up 2.7% of the total;* [2] (2) it added an area on the lower East Side called Stuyvesant Town *of whose population Negroes and Puerto Ricans make up 0.5% of the total;* and (3) it dropped from the Seventeenth District and added to the Eighteenth District a two-block area from 98th Street to 100th Street between Fifth Avenue and Madison Avenue *of whose population Negroes and Puerto Ricans make up 44.5% of the total.*

To achieve this racial gerrymandering, careful manipulation of the boundaries of the Eighteenth District was necessary. The southeast corner is near the East River and from there it goes—west four blocks, north two blocks, west one block, north five blocks, west one block, north one block, west one block, north one block, west one block, north eleven blocks, west five blocks across the northern line of Central Park to Morningside, north along Morningside about twelve blocks, west one block, north along Amsterdam from 122d to 150th, east two blocks, north fifteen blocks to 165th, and east to East River.

The record strongly suggests that these twists and turns producing an 11-sided, step-shaped boundary between the Seventeenth and Eighteenth Districts were made to bring into the Eighteenth District and keep out of the

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[2] An area extending from 89th Street to 95th Street, between Third Avenue and the East River, was left in the Eighteenth District. This area of 10,507 persons is less than 5% Negro and Puerto Rican. There is, however, a new low-cost public housing project (of the type in which the average Negro-Puerto Rican occupancy in Manhattan will be about 75%) which has been scheduled for construction in that area. Because of that project and the general southward push of the Negro and Puerto Rican population, the area south of 95th Street appears to be but a temporary buffer zone.

Seventeenth as many Negroes and Puerto Ricans as possible. There is to be sure no finding to this effect by the three-judge District Court. One of the three judges thought, as I do, that the uncontradicted facts establish *per se* a prima facie case of a legislative purpose to design the Seventeenth and Eighteenth Districts on racial lines (211 F. Supp. 460, 472–473), saying that: "[In *Gomillion*] . . . it was a glaring exclusion of Negroes from a municipal district. Here it is a subtle exclusion from a 'silk stocking district' (as the 17th is so frequently referred to) and a jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors." *Id.*, at 474–475.

A second judge concluded that petitioners "have not met their burden of proving" that the boundaries in question were "drawn along racial lines." *Id.*, at 468. The third judge expressed no view on the precise issue.[3]

The evidence which I have summarized was not rebutted or challenged, the State introducing no evidence. We have not only inferences from conceded facts but also New York's frank concession that it is not possible to say "that race is irrelevant to districting."

Racial segregation that is state-sponsored should be nullified whatever may have been intended. In *Johnson* v. *Virginia*, 373 U. S. 61, we held segregation of a courtroom audience by race to be unconstitutional, without stopping to inquire what the motive may have been. A

[3] The closest intimation, though not on the precise issue, is contained in the following statement which he made in his opinion:

"No proof was tendered that the Legislature in drawing the district lines in previous years was motivated or influenced by any considerations which have become unconstitutional during subsequent years. Plaintiffs wholly failed to support their allegation of 'repeated and energetic efforts' to seek legislative correction or that efforts were unavailing because of unconstitutional apportionment." 211 F. Supp., at 467.

well-settled proposition applicable to many rights in the constitutional spectrum is that there may be an abridgement "even though unintended." See *NAACP* v. *Alabama*, 357 U. S. 449, 461, and cases cited. What the State has done is often conclusive irrespective of motive. *Eubanks* v. *Louisiana*, 356 U. S. 584, 587–588.

I had assumed that since *Brown* v. *Board of Education*, 347 U. S. 483, no State may segregate people by race *in the public areas*. The design of voting districts involves one important *public area*—as important as schools, parks, and courtrooms. We should uproot all vestiges of *Plessy* v. *Ferguson*, 163 U. S. 537, from *the public area*.

The intervenors are persons who apparently have a vested interest in control of the segregated Eighteenth District.[4] They and the State seem to support this segregation not on the "separate but equal" theory of *Plessy* v. *Ferguson*, *supra*, but on another theory. Their theory might be called the theory of "separate but better off"—a theory that has been used before. A like argument was made in *Buchanan* v. *Warley*, 245 U. S. 60, 81, in support of municipal segregation of residential areas; in *District of Columbia* v. *Thompson*, 346 U. S. 100, in support of segregation in restaurants; in *Watson* v. *Memphis*, 373 U. S. 526, in support of delayed integration of municipal parks. Indeed, the final argument of John W. Davis for South Carolina in *Brown* v. *Board of Education*, *supra*, ended with the words, "The good is sometimes better than the best."

The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards.

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[4] Adam Clayton Powell has represented the Eighteenth District in Congress since 1945.

II.

What we have in the Seventeenth and Eighteenth Districts in Manhattan is comparable to the Electoral Register System which Britain introduced into India. That system gave a separate constituency to Sikhs, Muslims, Anglo-Indians, Europeans, and Indian Christians.[5] Religious minorities found comfort and safety in such an arrangement. A Muslim deputation made the following demand: [6]

> "(1) That in the whole of India the Muslims number over 62 millions or between one-fifth and one-fourth of the total population;
>
> "(2) that as their numbers exceed the entire population of any first-class European Power, except Russia, Muslims might justly claim adequate recognition as an important factor in the State;
>
> "(3) that the representation hitherto accorded to them, almost entirely by nomination, had been inadequate to their requirements and had not always carried with it the approval of those whom the nominees were selected to represent; and
>
> "(4) that while Muslims are a distinct community with additional interests of their own, which are not shared by other communities, no Muslim would ever be returned by the existing electoral bodies, unless he worked in sympathy with the Hindu majority in all matters of importance."

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[5] Acharya, Indian Elections and Franchise (1937), p. 17:

"No one who is not a Sikh, a Muhammadan, Anglo Indian, European or an Indian Christian, is entitled to be included in a Sikh, Muhammadan, Anglo Indian, European or an Indian Christian constituency respectively. No person who is entitled to be included in a Sikh, Muhammadan, Anglo Indian, European or an Indian Christian constituency will be included in the electoral roll for a General Constituency in a province."

[6] Ahsan, Community Electorates in India (1934), pp. 6–7.

Lord Morley made the following reply: [7]

> "The Muslims demand three things. I had the pleasure of receiving a deputation from them and I know very well what is in their minds. They demand an election of their own representatives to these councils in all the stages just as in Cyprus, where, I think, Muslims vote by themselves; they have nine votes and the non-Muslims have three or the other way about; so in Bohemia where the Germans vote alone and have their own register; therefore we are not without a precedent and a parallel for the idea of a separate register. Secondly, they want a number of seats in excess of their numerical strength. These two demands we are quite ready and intend to meet in full."

Hindus responded favorably.[8] The Joint Report of 1918 stated: [9]

> "Some persons hold that for a people, such as they deem those of India to be, so divided by race, religion and caste as to be unable to consider the interests of any but their own section, a system of communal electorates and class representation is not merely inevitable but is actually best. They maintain that it evokes and applies the principle of democracy over the widest range over which it is actually alive at all, by appealing to the instincts which are strongest; and that we must hope to develop the finer, which are also at present the weaker instincts by using the forces that really count. According to this theory communal representation is an inevitable and even a healthy stage in the development of a non-political people."

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[7] *Id.*, at 11.
[8] *Id.*, at 12.
[9] *Id.*, at 16.

As already noted, the Electoral Register System was not peculiar to British India. Other nations used it.[10] Lebanon today has a modified version: each of eight religious

[10] The constitution of modern Cyprus divides the electorate into the Greek community, the Turkish community, and religious communities. Constitution of Cyprus, Aug. 16, 1960, Pt. I, Art. 2 (3). The legislature is allotted 70% to the Greek community and 30% to the Turkish. *Id.*, Pt. IV, Art. 62 (2). Each community elects a communal chamber that has legislative power over select matters, *e. g.*, religion, education, personal status, etc. *Id.*, Pt. V, Arts. 86, 87.

Allocation along community lines of specified offices appears in various forms at each stratum of government. For example the President is Greek, the Vice President, Turkish. *Id.*, Pt. I, Art. 1. "The public service shall be composed as to seventy per centum of Greeks and as to thirty per centum of Turks." *Id.*, Pt. VII, Art. 123 (1).

Cyprus shows some of the end products of fractionalizing communities by race. After the recent riots of Turks versus Greeks, Arnold Toynbee commented on the Cyprus complex:

"Unfortunately the Cypriots have to contend with the incubus of their history, and of the memories that this history has left rankling in their minds.

"Cyprus, together with the Lebanon, is the last unpartitioned remnant of a great multi-national society, the Ottoman Empire. In the course of the last 150 years, all the rest of the vast former Ottoman dominions has been partitioned into a mosaic of national successor-states, in each of which some single nationality is now master of the house.

"Unfortunately the tide of history has run too strongly in the direction of partition on national lines, with all the woes that this inevitably entails. The mutual animosity of the intermingled peoples has been too strong; the prestige of the exotic Western political ideology of nationalism has been too potent. In the Lebanon, as well as in Cyprus, a regime requiring cooperation between different ex-Ottoman nationalities is something of a *tour de force*, as the recent civil war in the Lebanon showed. In Cyprus it would be utopian to hope that the lion and the lamb will lie down together, and that a little child will lead them. The truth is that there are no ex-Ottoman lambs; the ex-Ottoman peoples are all lions or tigers.

"It looks then as if in Cyprus the price of political stabilization is going to be the segregation of intermingled nationalities that are irreconcilable." Washington Post, Jan. 11, 1964, p. A8.

groups has electoral districts from which only a member of that faith can be chosen for the legislature.[11]

Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—"of the people, by the people, for the people." Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U. S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates.[12] But government has no business designing electoral districts along racial or religious lines. We held in *Akins* v. *Texas*, 325 U. S. 398, 403, and in *Brown* v. *Allen*, 344 U. S. 443, 471, that courts in selecting juries need not—indeed should not—give each jury list the proportional racial complexion that the community

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[11] The 1927 Lebanese Constitution established a unicameral legislature. See II Patai, The Republic of Lebanon (1956), p. 533. The number of deputies now is 99. Statesman's Year-Book 1963–1964, p. 1222. Prior to that increase it had 66 members elected according to the following proportional division among religious groups: 20 Maronites; 26 Moslems, of whom 12 were Shi'ites; 7 Greek Orthodox; 4 Druses; 4 Greek Catholics; 3 Armenian Orthodox; 1 Armenian Catholic; 1 other religious minority. 17 Encyclopedia Americana (1963), p. 175. See I Khalil, The Arab States and the Arab League (1962), pp. 124, 133; Ziadeh, The Lebanese Elections, 14 Middle East J. 367 (1960).

[12] See Dawidowicz and Goldstein, Politics in a Pluralistic Democracy (1963).

has. If race is not a proper criterion for drawing a jury list, how can it be in designing an electoral district?

In *Anderson* v. *Martin*, 375 U. S. 399, we barred Louisiana from putting on a ballot opposite a Negro candidate's name the word, "Negro," as it was a device encouraging racial discrimination. When we said in that case that a State may not encourage its citizens "to vote for a candidate solely on account of race," *id.*, at 404, I had assumed that we would hold *a fortiori* that no State could make an electoral district out of any racial bloc unless the electoral unit represented an actual neighborhood. Yet we violate that principle here.

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

"Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I fully agree with and join what my Brother DOUGLAS has written in dissent but wish to add these words by way of comment on the Court's opinion.

The question for decision in this case is whether appellants have sustained their burden of proving that the boundaries of the Seventeenth and Eighteenth Congressional Districts of New York were purposefully drawn on racial lines. The Court resolves this question against appellants by accepting "the District Court's finding that

appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin." *Ante*, at 58.

My difficulty with this conclusion is that the record does not support the Court's treatment of the District Court's finding. The District Court was a three-judge court and the three judges did not agree upon and, as a court, made no express findings of fact. Instead there were three separate and differing opinions. Judge Moore implied that racially segregated voting districts are constitutional absent a showing of serious under-representation or other specific harm to the individual complainants. 211 F. Supp. 460, 467–468. He also suggested that segregated voting districts could be constitutionally justified because they may enable persons of the same race or place of origin "to obtain representation in legislative bodies which otherwise would be denied to them." *Id.*, at 467. Finally, Judge Moore intimated that factually segregated voting districts would be unconstitutional only where the legislature was "motivated or influenced" to create such districts. *Ibid.* To establish this motivation or influence complainants must introduce proof, and in this case no such proof was tendered by the appellants who, therefore, failed to make a case "upon the facts and the law." *Id.*, at 468.

Judge Moore did not in my view apply the proper constitutional standard. The Constitution, I strongly believe, proscribes state-sanctioned racial segregation in legislative districting as well as in voting and in public schools and facilities. *E. g., Brown* v. *Board of Education*, 347 U. S. 483; *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Johnson* v. *Virginia*, 373 U. S. 61; *Watson* v. *City of Memphis*, 373 U. S. 526; *Goss* v. *Board of Education*, 373 U. S. 683; *Anderson* v. *Martin*, 375 U. S. 399. Certainly in these areas the Fourteenth Amendment "nul-

lifies sophisticated as well as simple-minded modes of discrimination." Cf. *Lane* v. *Wilson*, 307 U. S. 268, 275. This Court has declared state-sanctioned segregation invalid on the ground that, under the Constitution, distinctions by law between citizens because of their race, ancestry, color or religion "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Given this settled principle that state-sanctioned racial segregation is unconstitutional *per se*, a showing of serious under-representation or other specific harm to individual complainants is irrelevant. I understand the Court's decisions since *Brown* v. *Board of Education, supra*, to hold that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation. The Fourteenth Amendment commands equality, and racial segregation by law is inequality. Judge Moore, therefore, did not apply the proper constitutional standard.

Furthermore, as I shall point out, Judge Moore also erred in holding that in any event appellants' proof was insufficient to establish a prima facie case of unconstitutional racial districting.

Judge Feinberg disagreed both with Judge Moore's implication that segregated voting districts are constitutional absent serious under-representation and with the view that segregated districts could be constitutionally justified by alleged advantages to persons of a particular race or place of origin. Judge Feinberg stated that the "constitutional vice would be use by the legislature of an impermissible standard, and the harm to plaintiffs that need be shown is only that such a standard was used." 211 F. Supp., at 468. He then frankly acknowledged that:

> "The case is a closer one for me than the opinion of Judge Moore would indicate it is for him. Plain-

> tiffs did introduce evidence which might justify an inference that racial considerations motivated the 1961 reapportionment of congressional districts in Manhattan. However, other inferences . . . are equally or more justifiable. Plaintiffs have a difficult burden to meet in attacking the constitutionality of this state statute." *Id.*, at 469.

Judge Feinberg, on this reasoning, cast his vote for Judge Moore's result on the ground that appellants failed to sustain the "difficult burden" of attacking the constitutionality of this statute: Even where such racially segregated districting results and complainants' evidence "might justify an inference that racial considerations motivated" the districting, still complainants fail to sustain their burden unless they also disprove every other permissible or reasonable purpose which the legislature might have had in mind.

Judge Murphy, in his dissent, agreed with Judge Feinberg as to the applicable constitutional standard. But, on Judge Murphy's view of the record, the appellants carried their burden of proving that "the legislation was solely concerned with segregating white, and colored and Puerto Rican voters by fencing colored and Puerto Rican citizens out of the 17th District and into a district of their own (the 18th)"; that the legislation had effected "obvious segregation"; and that the statute constituted a "subtle exclusion" of Negroes from the Seventeenth and a "jamming in of colored and Puerto Ricans into the 18th or the kind of segregation that appeals to the intervenors." *Id.*, at 473–475. Accordingly, Judge Murphy thought appellants had met their burden of proving segregation and, in the absence of any proof by the State or by intervenors, were entitled to a judgment declaring the statute unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

In light of these conflicting opinions and analyses, this case cannot be fairly decided on the ground stated in the opinion of the Court, *viz.*, that "[w]e accept the District Court's finding." *Ante*, at 58. Which finding and under what constitutional standard—Judge Moore's, Judge Feinberg's or Judge Murphy's? Judges Moore and Feinberg, who comprised the majority below, differed both with regard to the constitutional standard and, as I read the opinions, with regard to the proof. It should not be forgotten that the conclusions of the District Court—both as to law and fact—have not been reviewed by an intermediate appellate tribunal. Instead the case has come directly to this Court from a three-judge District Court and presents a record containing variant and inconsistent legal and factual conclusions. Even where a three-judge District Court has made a unanimous finding of fact, this Court has given that finding less deference where, as here, it depends on evidence that is largely documentary and particularly where, as here, "the crucial issues involve mixed questions of law and fact." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396. In my view, we cannot, in light of the record in this case, rest our decision on the "finding" of the District Court without abdicating our responsibility for principled constitutional adjudication.

My Brother DOUGLAS in his dissent has set forth the virtually undisputed facts. I shall not repeat them here. He has also set forth the correct constitutional standard which I believe we should unhesitatingly reaffirm and apply. On the basis of the evidence,[1] I agree with Judge

[1] Judge Murphy in his dissent stated:

"The uncontradicted proof submitted by plaintiffs, however, establishes a visual figure picture of the end results of the recent redistricting of Manhattan Isle (New York County) as follows:

"Manhattan has a population of 1,698,281 people and is entitled to four congressmen. The census figures of 1960 divided the ethnic

Murphy's conclusion "that the only available inference from the . . . uncontradicted figure picture establishes *per se* a *prima facie* case of a legislative intent to draw congressional district lines in the 17th and 18th Districts on the basis of race and national origin." *Id.*, at 472–473. At least, however, appellants' proof made it appear

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groups into only two classes—white and non-white and Puerto Rican. These classes have been counted and according to the census 1,058,589 or 62.3% are white and 639,622 or 37.7% are non-white and Puerto Rican.

"The district lines as fixed by Chapter 980 created the four districts in question with the following make-up:

District	Total Population	White Population % of District		Non-White and Puerto Rican Origin Population of District	
17th	382,320	362,668	94.9%	19,652	5.1%
18th	431,330	59,216	13.7%	372,114	86.3%
19th	445,175	318,223	71.5%	126,952	28.5%
20th	439,456	318,482	72.5%	120,974	27.5%
Total	1,698,281	1,058,589	62.3%	639,692	37.7%

"The following table shows the percent of non-white persons and persons of Puerto Rican origin in each congressional district in relation to the total number of such persons in the entire county:

District	% of Non-White and Puerto Rican of County
17th	3.1%
18th	58.2%
19th	19.8%
20th	18.9%
	100.0%

"The figure picture of the 17th District shows that the lines as drawn encompass a population 94.9% white and 5.1% non-white and Puerto Rican. It further shows it has a population of 382,320 people, or between 15.4% and 12% less than any of the adjoining districts. The 18th District encompasses a population that is 86.3% non-white and Puerto Rican and only 13.7% white. Its population of 431,330 people is 12% more than the 17th and 5% above the state average." 211 F. Supp. 460, 472.

probable that a racial criterion shaped the 1961 reapportionment and that an inference of reliance on such an impermissible criterion was more reasonable than an inference that other factors alone had been used. In my view, then, this justifiable inference was sufficient to raise a rebuttable presumption of unconstitutionality and, without shifting the ultimate burden of proof, to place on the State the burden of going forward and introducing rebuttal evidence. See Note, 72 Yale L. J. 1041, 1056–1061. It might be that the appellees and intervenors could have offered proof to counteract the inference of racial districting, but they chose not to do so. They might, for example, have attempted to prove that the lines were drawn in an attempt to equalize the population of districts or to follow neighborhood lines. The simple answer is that appellees made no attempt whatever to rebut the inference that race was a criterion in—or racial segregation a purpose of—the districting.[2]

The question therefore recurs: What more need appellants have proved? Judge Moore apparently would have required them to introduce proof that the legislature's actual motive was to create racially segregated voting districts. Appellants, however, by their evidence established a pattern of segregation not adequately explained on a geometric, geographic, equalization, party-compromise, neighborhood or other basis. To require a showing of racial motivation in the legislature would place an impossible burden on complainants. For example, in this case the redistricting bill was recommended and submitted to the legislature on November 9, 1961, passed on November 10, 1961, and signed by the Governor on that date. No public hearings were had on the bill and no

[2] In fact the State in its brief in this Court candidly asserts "that a Legislature may 'consider' race in drawing Congressional district lines and . . . that there is no per se prohibition against classifications by race."

statements by the bill's managers or published debates were available. Under these circumstances, appellants' evidence, showing the factual pattern of segregation outlined by MR. JUSTICE DOUGLAS and by Judge Murphy, was sufficient to establish a prima facie case of unconstitutional racial districting. Once this had been done, appellees should have introduced evidence negating the inference that racial segregation was a purpose of the districting. In the absence of such proof by the State, I am compelled to conclude that racial segregation was a criterion in—or a purpose of—the districting of New York's Seventeenth and Eighteenth Congressional Districts. I, therefore, respectfully dissent.

Syllabus.

UNITED STATES *v.* HEALY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 64. Argued January 6, 1964.—Decided February 17, 1964.

1. An indictment was dismissed by the District Court before trial based upon the construction of the statute upon which the indictment was founded. The Government filed notice of appeal within 30 days of the denial of the petition for rehearing, but more than 30 days after the entry of the original judgment. Under Rule 11 (2) of this Court, a criminal appeal from a district court to this Court must be filed within 30 days after entry of "the judgment or order" appealed from, and appellees contended that the filing of a petition for rehearing without authorization by statute or rule cannot extend the time for appeal. *Held:* The timely filing of a petition for a rehearing in a criminal case, no less than in a civil case, renders the judgment nonfinal for purposes of appeal until the court disposes of the petition, and in such an instance the 30-day period prescribed by Rule 11 (2) begins to run from the date of the denial of the petition for rehearing. Pp. 77–80.

2. Appellees were indicted under two counts for forcing at gunpoint the pilot of a private airplane to transport them from Florida to Cuba. One count, under 18 U. S. C. § 1201, for kidnaping, was dismissed by the District Court on the ground that the kidnaping was not "for ransom or reward or otherwise" unless committed for the pecuniary benefit of the defendant. *Held:* The statute, as *Gooch* v. *United States*, 297 U. S. 124, plainly held, is not confined to kidnapings for pecuniary gain; nor need the underlying purpose for which the kidnaping is done be an illegal one in order for the statute to apply. Pp. 81–82.

3. The other count, under § 902 (i) of the Federal Aviation Act of 1958, as amended in 1961, for "aircraft piracy," was dismissed by the District Court on the ground that a private airplane is not "an aircraft in flight in air commerce" within the meaning of the statute. *Held:* Both the language of the statute and its legislative history manifest congressional intent to include private aircraft within the scope of § 902 (i). Pp. 83–85.

Reversed and remanded.

Stephen J. Pollak argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack.*

Robert L. Shevin argued the cause for appellees. With him on the brief were *R. E. Kunkel* and *Alvin Goodman.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

A federal grand jury alleged in an indictment, returned in the United States District Court for the Southern District of Florida, that on April 13, 1962, the appellees had kidnaped at gunpoint the pilot of a private Cessna 172 airplane and compelled him to transport them from Florida to Cuba. Count 1 of the indictment charged appellees with having violated 18 U. S. C. § 1201,[1] the Federal Kidnaping Act. Under Count 2, appellees were charged with the commission of "aircraft piracy" in contravention of a 1961 amendment to § 902 of the Federal Aviation Act of 1958, 75 Stat. 466, 49 U. S. C. (Supp. IV) § 1472 (i).[2]

The District Court dismissed the indictment on September 17, 1962, before trial. It held that a kidnaping is not "for ransom or reward or otherwise," as required by § 1201 (a), unless committed for the pecuniary benefit of

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[1] "(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished . . . ."

[2] "(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished . . . .

"(2) As used in this subsection, the term 'aircraft piracy' means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce."

the defendant and that a private airplane is not "an aircraft in flight in air commerce" within the meaning of the aircraft piracy provision, which it read as limited to commercial airliners. The Government's petition for rehearing, filed October 17, was denied on November 8. On December 5, the Government filed a notice of appeal to this Court under 18 U. S. C. § 3731, permitting direct appeal when the dismissal of an indictment is based on construction of the statute upon which the indictment is founded. We noted probable jurisdiction, 372 U. S. 963. We conclude that the judgment of dismissal must be reversed.

I.

Appellees contend that this Court is without jurisdiction and is thereby precluded from considering the case on its merits. They argue that, absent authorization by statute or rule, the filing of a petition for rehearing by the Government in a criminal case cannot extend the time for appeal. Rule 11 (2) of this Court provides:

> "An appeal permitted by law from a district court to this court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the district court within thirty days after entry of the judgment or order appealed from."

It is undisputed that the notice of appeal was filed by the United States within 30 days from the denial of the petition for rehearing, although not within 30 days of the original entry of judgment. Since the petition for rehearing was filed within 30 days of the judgment, we are not faced with an attempt to rejuvenate an extinguished right to appeal. Cf. *Allegrucci* v. *United States*, 372 U. S. 954. The question, therefore, is simply whether in a criminal case a timely petition for rehearing by the Government filed within the permissible time for appeal

renders the judgment not final for purposes of appeal until the court disposes of the petition—in other words whether in such circumstances the 30-day period prescribed by Rule 11 (2) begins to run from the date of entry of judgment or the denial of the petition for rehearing.

The latter is the well-established rule in civil cases, whether brought here by appeal or certiorari, *e. g., United States* v. *Ellicott*, 223 U. S. 524, 539; *Morse* v. *United States*, 270 U. S. 151, 153–154; *Bowman* v. *Loperena*, 311 U. S. 262, 264–266. That a rehearing petition, at least when filed within the original period for review, may also extend the time for filing a petition for certiorari by a criminal defendant is the unarticulated premise on which the Court has consistently proceeded. See, *e. g., Panico* v. *United States*, 375 U. S. 29 (order extending time for filing entered 19 days after denial of petition for rehearing *en banc*, 45 days after original judgment of Court of Appeals); *Corey* v. *United States*, 375 U. S. 169 (petition for certiorari filed 30 days after denial of rehearing, 45 days after original judgment of Court of Appeals); *Genovese* v. *United States*, decided with *Evola* v. *United States*, 375 U. S. 32 (order extending time for filing entered 16 days after denial of rehearing and rehearing *en banc*, 49 days after entry of original judgment). In *Craig* v. *United States*, 298 U. S. 637, this Court dismissed an application for a writ of certiorari as premature, "without prejudice to a renewal of the application within thirty days after action by the Circuit Court of Appeals on the petition for rehearing." This summary disposition plainly reflects an advertent decision that criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending.

We have recently recognized the appropriateness of petitions for rehearing by the United States in criminal cases, *Forman* v. *United States*, 361 U. S. 416, 425–426.

The practice of the Court has been to treat such petitions as having the same effect on the permissible time for seeking review as do similar petitions in civil cases and in criminal cases in which the Government has won below. *United States* v. *Williams*, 341 U. S. 58 (appeal from dismissal of indictment by District Court; notice of appeal filed 29 days after denial of motion for rehearing, 44 days after entry of original order); *United States* v. *Smith*, 342 U. S. 225 (appeal from dismissal of indictment by District Court; notice of appeal filed 28 days after denial of petition for rehearing, 109 days after entry of original order); *United States* v. *Calderon*, 348 U. S. 160 (petition for certiorari from Court of Appeals; order extending time for filing entered 28 days after denial of rehearing, 88 days after entry of original judgment).

Appellees place great reliance on the absence of any statute or rule governing the effect of rehearing petitions of the Government, but both the civil and criminal procedural doctrines lack such a foundation. The wording of Rule 11 (2) of this Court, as unilluminating on this issue as it may be standing alone, is virtually identical to that of Rule 22 (2), which encompasses petitions for certiorari both by criminal defendants and the Government. The inference is compelling that no difference in treatment is intended between appealable judgments and those reviewable by certiorari, or between criminal defendants and the United States. We are constrained to read these rules as consistent with a traditional and virtually unquestioned practice.

Rule 37 (a)(2) of the Federal Rules of Criminal Procedure [3] does not alter this conclusion, since it sheds no

[3] "*Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying

light on the relevance of a petition for rehearing. Nor can the principle of strict construction of statutes permitting governmental appeals in criminal cases, *Carroll* v. *United States*, 354 U. S. 394, be utilized to undermine a well-established procedural rule for criminal, as well as civil, litigation. No persuasive considerations of policy dictate a deviant standard for government appeals.

Of course speedy disposition of criminal cases is desirable, but to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation—since plenary consideration of a question of law here ordinarily consumes more time than disposition of a petition for rehearing—and could, in some cases, impose an added and unnecessary burden of adjudication upon this Court.[4] It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below, and no significant saving of time would be achieved by altering the ordinary rule to the extent of compelling a notice of appeal to be filed while the petition for rehearing is under consideration.

We conclude that this appeal was timely filed and that the Court has jurisdiction to determine the case on its merits.

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the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

[4] In this case, the record and legal issues plainly indicate the good faith of the Government in petitioning for rehearing. We would, of course, not countenance the United States' using such petitions simply as a delaying tactic in criminal litigation; there is, however, not the slightest basis for believing that it would try to do so.

II.

By interpreting 18 U. S. C. § 1201 to require a motive of pecuniary profit, the District Court disregarded the plain holding of *Gooch* v. *United States,* 297 U. S. 124, in which the defendant, who had seized and carried away a state peace officer attempting to effectuate his arrest, was held subject to prosecution under the statute. Prior to a 1934 amendment, the Federal Kidnaping Act had been applicable only if the person transported was held for ransom or reward. The wording was then changed to encompass persons held "for ransom or reward *or otherwise,* except, in the case of a minor, by a parent thereof," 48 Stat. 781. (Emphasis added.) The Court in *Gooch,* noting the ambiguity of the word "reward," found convincing evidence in the amendment's legislative history that the addition of "otherwise" was intended to make clear that a nonpecuniary motive did not preclude prosecution under the statute. The Senate Judiciary Committee, which quoted from a memorandum of the Justice Department, and the House Judiciary Committee both had reported that the bill was designed to extend federal jurisdiction under the Act to cases of persons kidnaped and held "not only for reward, but for any other reason." [5] The Court's conclusion that the amended statute covered the facts before it was clearly in accord with the congressional purpose.

The Courts of Appeals have consistently followed *Gooch, e. g., United States* v. *Parker,* 103 F. 2d 857; *Brooks* v. *United States,* 199 F. 2d 336; *Hayes* v. *United States,* 296 F. 2d 657, and appellees do not challenge the authority of that case. While recognizing that the

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[5] S. Rep. No. 534, 73d Cong., 2d Sess., Mar. 20, 1934; H. R. Rep. No. 1457, 73d Cong., 2d Sess., May 3, 1934, p. 2.

statute is not limited to kidnapings for pecuniary gain, they assert that it is restricted to kidnapings for an otherwise *illegal* purpose. This contention is without support in the language of the provision, its legislative history, judicial decisions, or reason. The wording certainly suggests no distinction based on the ultimate purpose of a kidnaping; were one intended, the exclusion of parent-child kidnapings would have been largely superfluous, since such conduct is rarely the result of an intrinsically illegal purpose. Nothing in the reports or debates supports appellees' position. In two cases, *Wheatley* v. *United States*, 159 F. 2d 599, 600; *Bearden* v. *United States*, 304 F. 2d 532 (judgment vacated on another ground, 372 U. S. 252), Courts of Appeals have assumed that the applicability of the statute does not turn on the illegality of the ultimate purpose of the kidnaper. No policy considerations support appellees' strained reading of 18 U. S. C. § 1201. A murder committed to accelerate the accrual of one's rightful inheritance is hardly less heinous than one committed to facilitate a theft; by the same token, we find no compelling correlation between the propriety of the ultimate purpose sought to be furthered by a kidnaping and the undesirability of the act of kidnaping itself. Appellees rely on the principle of strict construction of penal statutes,[6] but that maxim is hardly a directive to this Court to invent distinctions neither reflective of the policy behind congressional enactments nor intimated by the words used to implement the legislative goal.[7]

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[6] *Chatwin* v. *United States*, 326 U. S. 455, which involved the transporting of a girl to maintain a "celestial" marriage, is inapposite. There the element of coercion or deception, central to the crime of kidnaping, was absent.

[7] Our disposition of this issue relieves us from considering whether appellees' ultimate purpose was unlawful and, if so, whether illegality of purpose, if not obvious, is a necessary element in the

We hold that the District Court improperly dismissed the first count of the indictment.

III.

The 1961 "aircraft piracy" amendment to the Federal Aviation Act makes it a federal crime, *inter alia,* to exercise control, by threat of force with wrongful intent, of "an aircraft in flight in air commerce," § 902 (i), 75 Stat. 466, 49 U. S. C. (Supp. IV) § 1472 (i). Examination of the provision itself and its relation to the rest of the statute, apart from reference to the legislative history, stands against the conclusion of the court below. The Cessna 172 was "an aircraft"; it was "in flight"; it was in flight "in air commerce." Appellees assert that had Congress intended to include private airplanes it could have referred to "any aircraft," but, standing alone, the phrase "an aircraft" is on its face an all-inclusive term. Appellees' contention that the statutory language refers only to commercial airlines is contradicted by the definition of air commerce in the original act, § 101 of the Federal

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indictment. However, it may be observed that a trip to Cuba would have been lawful only if appellees had had passports specifically endorsed for travel to Cuba. See Presidential Proclamations No. 2914, Dec. 16, 1950 (64 Stat. A454); and No. 3004, Jan. 17, 1953 (67 Stat. C31); § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U. S. C. § 1185; Department of State Public Notice 179, 26 Fed. Reg. 492, Jan. 16, 1961. Appellees, without claiming lawfulness of purpose, argue that the burden of showing that they had not complied with the regulations governing travel to Cuba rests with the United States and that noncompliance has to be specifically alleged in an indictment.

The discussion concerning the legality of travel to Cuba points up how untenable is appellees' basic position. It would surely be anomalous were application of the Kidnaping Act made to turn on whether existing regulations permit travel to the point of destination without a passport, with an ordinary passport, or only with a passport specially endorsed.

Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. (Supp. IV) § 1301:

> "(4) 'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Without question, this definition covers the facts alleged in the indictment in this case. That the relation between the language of the "aircraft piracy" amendment and the above definition was not overlooked by the drafters is indicated by the different phraseology used in a contemporaneous amendment concerning concealed weapons. Section 902 (l) of the amended act, 75 Stat. 466, 49 U. S. C. (Supp. IV) § 1472 (l), makes it a crime to carry such a weapon "while aboard an aircraft being operated by an air carrier in air transportation." Thus Congress knew how to choose words to refer solely to commercial airliners when it wished to do so.

The conclusions drawn from the statute itself are confirmed by the legislative history. The House Committee on Interstate and Foreign Commerce reported, H. R. Rep. No. 958, 87th Cong., 1st Sess., that the term "air commerce" was used by design because of its broad scope as defined in existing law, p. 8. It specifically cited "the urgent need for stronger Federal laws applicable to criminal acts committed aboard commercial and private aircraft," p. 3, and noted that the subsection regarding weapons "would be limited to aircraft being used in air carrier commercial operations, whereas these other subsections [including that relating to aircraft piracy] would apply also in the case of private aircraft," p. 15.

Comments during House debate accord with the Committee's understanding, see remarks of Congressman Harris (107 Cong. Rec. 16545) and Congressman Williams (107 Cong. Rec. 16547–16548). The remarks of Senator Engle, the sponsor of the aircraft piracy provisions in the Senate, during debate are explicit: "Yes; it applies to all airplanes in air commerce, which includes, of course, not only commercial aircraft, but private airplanes as well." (107 Cong. Rec. 15243). The statements of members of Congress evincing a concern for the protection of passengers aboard commercial airlines, see, *e. g.*, remarks of Congressman Rostenkowski (107 Cong. Rec. 16552), do not reflect any intent to put private aircraft beyond the scope of the provision. Indeed, since one of the often-expressed purposes of the aircraft piracy amendment was to provide a solution to the jurisdictional problems involved in fixing a locus for a crime committed in transit and in arresting a deplaning passenger who may have engaged in criminal activity over the territory of a different State, see, *e. g.*, H. R. Rep. No. 958, 87th Cong., 1st Sess., pp. 3–5, one would suppose, absent any other evidence, a design to include private aircraft; these problems are as pertinent to acts committed aboard them as to those done on commercial airliners. Finding that the plainly expressed intent of Congress, as manifested both in the statutory language and legislative history, was to include private aircraft within the scope of § 902 (i), we conclude that dismissal of the second count of the indictment was also incorrect.

The judgment below is reversed and the case is remanded to the District Court with instructions to reinstate both counts of the indictment.

It is so ordered.

720-509 O-65—10

UNITED STATES *v.* WIESENFELD WAREHOUSE CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 92. Argued January 16, 1964.—Decided February 17, 1964.

Appellee, a public storage warehouseman, was charged by criminal information with violations of § 301 (k) of the Federal Food, Drug, and Cosmetic Act, which prohibits acts involving defacement of labels of food and other specified articles held for sale after interstate shipment and the "doing of any other act" with respect to such articles which results in their being adulterated or misbranded. Under § 402 (a) (4) adulteration is defined to include holding food under insanitary conditions whereby it may have been contaminated with filth. The District Court, construing the statute under the rule of *ejusdem generis* as applying only to acts of the same general nature as those specifically enumerated with respect to label-defacing and as being too vague to include the mere "holding" of articles, dismissed the information for failure to state an offense. *Held:*

1. Section 301 (k), as is clear from its wording and legislative history, defines two distinct offenses—one concerning label-defacing and the other concerning adulteration; and the criminal information properly charged an offense for adulteration under the Act. Pp. 89–92.

2. Section 301 (k) is not limited to one holding title to goods and therefore applies to a public storage warehouseman whether he owns the goods stored or not. P. 92.

217 F. Supp. 638, reversed and remanded.

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *William W. Goodrich.*

James S. Taylor argued the cause for appellee. With him on the brief was *Clarence G. Ashby.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 301 (k) of the Federal Food, Drug, and Cosmetic Act prohibits the "alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated or misbranded." [1] Section 402 of the Act provides, among other things, that "[a] food shall be deemed to be adulterated—(a) . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health . . . ." [2] The question presented by this appeal is whether a criminal information which alleges the holding of food by a public storage warehouseman (after interstate shipment and before ultimate sale) under insanitary conditions in a building accessible to rodents, birds and insects, where it may have become contaminated with filth, charges an offense under § 301 (k).

The Government filed a criminal information containing allegations to this effect [3] in the District Court for

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[1] 52 Stat. 1040, 21 U. S. C. § 331 (k).

[2] 52 Stat. 1040, 21 U. S. C. §§ 342 (a) (3) and (4).

[3] The information was in six counts, the counts differing only with respect to the particular shipment or product involved. Each count charged that appellee had received an article of food which had been shipped in interstate commerce, and that while this food was being held for sale, appellee caused it to be held in a building accessible to rodents, birds, and insects, thus exposing it to contamination, and thereby adulterating the food within the meaning of § 402 (a) of the Act, 21 U. S. C. § 342 (a), in that the food consisted in part of a filthy sub-

the Middle District of Florida, charging the appellee, a public storage warehouseman, with violations of § 301(k). The court construed § 301(k) as not applying to the mere act of "holding" goods, and dismissed the information for failure to allege an offense under the statute. 217 F. Supp. 638, 639. The order of dismissal was appealed by the Government under the Criminal Appeals Act, which gives this Court jurisdiction to review on direct appeal a judgment dismissing an information on the basis of a "construction of the statute upon which the . . . information is founded."[4] We noted probable jurisdiction. 373 U. S. 921. For the reasons which follow, we reverse the judgment of the District Court.

In arriving at its construction of the statute, the District Court reasoned that § 301(k) "as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods." 217 F. Supp., at 639. Accordingly, "in an effort to uphold the statute as constitutional," the court applied the rule of *ejusdem generis* to limit the words "the doing of any other act" in § 301 (k) to acts of "the same general nature" as those specifically enumerated in the subsection, *i. e.*, acts relating to the alteration, mutilation, destruction, obliteration, or removal of the labeling of articles. *Ibid.* We find such reliance on the rule of *ejusdem generis* misplaced; its application to § 301 (k) is contrary to both the text and legislative his-

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stance, to wit, rodent excreta, insect larvae, etc., and in that it was held under insanitary conditions whereby it might have become contaminated with filth.

[4] "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . ." 62 Stat. 844, 18 U. S. C. § 3731.

tory of the subsection, and unnecessary to a constitutionally permissible construction of the statute.

The language of § 301 (k) unambiguously defines two distinct offenses with respect to food held for sale after interstate shipment. As originally enacted in 1938, the subsection prohibited "[t]he alteration, mutilation, destruction, obliteration, or removal" of the label, or "the doing of any other act" with respect to the product which "results in such article being misbranded." [5] The section was amended in 1948 to prohibit additionally "the doing of any other act" with respect to the product which "results in such article being adulterated." [6] The acts specifically enumerated in the original enactment relate to the offense of misbranding through labeling or the lack thereof. The separate offense of adulteration, on the other hand, is concerned solely with deterioration or contamination of the commodity itself. For the most part, acts resulting in misbranding and acts resulting in adulteration are wholly distinct. Consequently, since the enumerated label-defacing offenses bear no textual or logical relation to the scope of the general language condemning acts of product adulteration,[7] application of the rule of *ejusdem generis* to limit the words "the doing of

[5] 52 Stat. 1042, 21 U. S. C. § 331 (k). See *United States* v. *Sullivan*, 332 U. S. 689.

[6] 62 Stat. 582, 21 U. S. C. § 331 (k).

[7] The House Committee concerned with the proposed amendment to § 301 (k) was aware of this textual problem.

"The present section 301 (k) forbids, first, certain acts with respect to the labeling of an article, and, second, 'any other act with respect to' the article itself which results in its being misbranded. . . . [A]dulteration more often occurs as a result of acts done to or with respect to the article itself. Since the section already contains the broad phrase 'any other act with respect to' the article, and since this phrase is not limited by the preceding enumeration of forbidden acts with respect to the labeling, there is no need in making it applicable to adulteration, to change the existing statutory language in this regard." H. R. Rep. No. 807, 80th Cong., 1st Sess., p. 3.

any other act" resulting in product adulteration in § 301 (k) to acts of the same general character as those specifically enumerated with respect to misbranding is wholly inappropriate.

Moreover, the legislative history makes plain that no such application of the rule was intended. As the House Committee Report on the proposed 1948 amendment unequivocally stated:

> "It seems clear that under the subsection as now in force the rule of ejusdem generis would not apply in interpreting the words 'or the doing of any other act . . . ,' and it is even more clear that this rule will not apply in the interpretation of the subsection as amended by this bill." [8]

It is equally clear from this legislative history that Congress intended to proscribe the particular conduct charged in the information filed below—the holding of food under insanitary conditions whereby it may have become contaminated. The House Committee Report noted that the amended section would "penalize, among other acts resulting in adulteration or misbranding, the act of holding articles under insanitary conditions whereby they may become contaminated with filth or rendered injurious to health," and emphasized that the Committee intended the amendments to be applied to their fullest constitutional limits.[9]

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[8] *Id.*, at pp. 3–4.

[9] *Id.*, at p. 6. During the Senate hearings on the amendment, the Associate Commissioner of Food and Drugs explained that "under the bill as enacted here, if there was a definite showing of violation on the part of the warehouse which had this material stored, a prosecution of them criminally for doing the act of holding under these insanitary conditions, which result in adulteration could ensue." Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, on S. 1190 and H. R. 4071, 80th Cong., 2d Sess., April 17, 1948.

Congress chose statutory language appropriate to effectuate this purpose. Section 301 (k), as amended, prohibits "any . . . act" which results in adulteration of the product. And food is adulterated if it "has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth." [10] This language defines with particularity an explicit standard of conduct. Section 301 (k), read together with the definition of food adulteration contained in § 402 (a)(4), therefore, gives ample warning that the "holding" or storing of food under insanitary conditions whereby it may have become contaminated is prohibited.

It is settled law in the area of food and drug regulation that a guilty intent is not always a prerequisite to the imposition of criminal sanctions. Food and drug legislation, concerned as it is with protecting the lives and health of human beings, under circumstances in which they might be unable to protect themselves, often "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U. S. 250." *United States* v. *Dotterweich*, 320 U. S. 277, 281.

It is argued, nevertheless, that the Government in this case is seeking to impose criminal sanctions upon one "who is, by the very nature of his business powerless" to protect against this kind of contamination, however high the standard of care exercised. Whatever the truth of this claim, it involves factual proof to be raised defensively at a trial on the merits. We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and

[10] See note 2, *supra*.

reach of the statute as applied to such facts as may be developed by evidence adduced at a trial.

Finally, the appellee attempts to uphold the dismissal of the information on a ground not relied on by the District Court. The appellee says that it was a bailee of the food, not a seller, and that it was not holding the food for sale within the meaning of § 301 (k). Both the language and the purpose of the statute refute this construction. The language of § 301 (k) does not limit its application to one holding title to the goods, and since the danger to the public from insanitary storage of food is the same regardless of the proprietary status of the person storing it, the purpose of the legislation—to safeguard the consumer from the time the food is introduced into the channels of interstate commerce to the point that it is delivered to the ultimate consumer—would be substantially thwarted by such an unwarranted reading of the statutory language. *United States* v. *Kocmond,* 200 F. 2d 370, 372; cf. *United States* v. *Sullivan,* 332 U. S. 689, 696; *United States* v. *Dotterweich,* 320 U. S. 277, 282.

Accordingly, we hold that a criminal information charging a public storage warehouseman with holding food (after interstate shipment and before ultimate sale) under insanitary conditions whereby it may have become contaminated with filth, charges an offense under § 301 (k) of the Federal Food, Drug, and Cosmetic Act. The order of the District Court dismissing the information is therefore reversed and the case is remanded to that court for further proceedings consistent with this opinion.

Reversed and remanded.

Syllabus.

SOUTHERN RAILWAY CO. *v.* NORTH CAROLINA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

No. 74. Argued January 14–15, 1964.—Decided February 17, 1964.*

The Interstate Commerce Commission under § 13a (2) of the Interstate Commerce Act authorized appellant railway company to discontinue two intrastate passenger trains, which provided the last remaining railway passenger service between two cities, having found that the service constituted an undue burden on interstate commerce and that the present or future public convenience and necessity permitted discontinuance of the service. A three-judge District Court set aside the Commission's order on the ground that the Commission had applied erroneous legal standards by not taking proper account of the freight profits on the line and the overall prosperity of the carrier. *Held:*

1. Under § 13a (2) the Commission need not give effect to the prosperity of the intrastate operations of the carrier as a whole or any particular segment thereof in determining whether the operation of a specific intrastate train or service imposes an unjust or undue burden on interstate commerce. P. 104.

2. The Commission may properly give varying weights to the overall prosperity of the carrier in different situations, balancing public convenience and necessity against undue burdens on interstate commerce. *Colorado* v. *United States*, 271 U. S. 153. Where the demands of public convenience and necessity are slight, as in this case, it is proper under § 13a (2) for the Commission in determining the existence of a burden on interstate commerce to give little weight to the carrier's overall prosperity. Pp. 104–105.

210 F. Supp. 675, reversed.

William T. Joyner argued the cause for appellant in No. 74. With him on the brief were *Earl E. Eisenhart, Jr.*, *Robert L. Randall* and *William H. Allen.*

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*Together with No. 93, *United States et al.* v. *North Carolina et al.*, also on appeal to the same court.

Robert W. Ginnane argued the cause for the United States et al. in No. 93. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Philip B. Heymann, Robert B. Hummel* and *H. Neil Garson.*

Charles W. Barbee, Jr., Assistant Attorney General of North Carolina, and *F. Gordon Battle* argued the cause for appellees in both cases. With them on the brief were *Thomas Wade Bruton*, Attorney General of North Carolina, *E. C. Bryson, Victor S. Bryant, A. H. Graham, Jr.* and *E. C. Brooks, Jr.*

Edward J. Hickey, Jr. and *James L. Highsaw, Jr.* filed a brief for the Railway Labor Executives' Association, as *amicus curiae*, urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1959 the appellant Southern Railway Company filed a petition with the North Carolina Utilities Commission for an order permitting it to discontinue operation of two intrastate passenger trains between Greensboro and Goldsboro, North Carolina, a distance of about 130 miles. The trains in question are No. 16, which operates eastbound in the morning from Greensboro to Goldsboro, and No. 13, consisting of the same equipment, which operates westbound in the late afternoon. Since 1958 these two trains have provided the last remaining railway passenger service between the two communities. The State Commission denied the petition, and its decision was upheld by the North Carolina Supreme Court. *State of North Carolina* v. *Southern Railway Co.*, 254 N. C. 73, 118 S. E. 2d 21 (1961).

Thereafter the railway company filed a petition with the Interstate Commerce Commission pursuant to § 13a (2)

of the Interstate Commerce Act,[1] seeking authority to discontinue operation of the trains. After a hearing at which several protestants, including the State of North Carolina, appeared, the examiner recommended that the petition be granted. Division 3 of the Commission agreed with the examiner and ordered discontinuance of the trains. The Division issued a report in which it found, *inter alia*, that the trains, which in 1948 had carried 56,739 passengers, carried only 14,776 passengers in

[1] Section 13a (2) of the Interstate Commerce Act, 49 U. S. C. § 13a (2), provides in pertinent part:

"Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph."

1960, the last full year for which figures were available; that the direct expenses of operating the trains during the latter year were over three times their total revenue; that discontinuance of the trains would result in savings of at least $90,589 per year; that the need shown for these trains was relatively insubstantial when viewed in light of the density of the population of the area served; that existing alternate transportation service by rail, bus, airline, and other means was reasonably adequate; and that the discontinuance of the passenger train service would not seriously affect the industrial growth of the area. Against the backgound of these findings, the examiner and Commission considered, but gave "little or no weight" to the overall prosperity of the carrier. The Commission's basic conclusions were summed up as follows:

> "that the public will not be materially inconvenienced by the discontinuance of the service here involved; that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remains in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce." 317 I. C. C. 255, 260.

After a petition for reconsideration by the entire Commission had been denied, the protestants instituted an action in a three-judge District Court seeking to set aside the order of the Commission. The court held, first, that it was erroneous as a matter of law for the Commission to order discontinuance of passenger trains under the provisions of § 13a (2) without first determining whether, once the profits from freight operations on

the same line were taken into account, "the particular segment of the railway involved is contributing its fair share to the over-all company operations . . . ." 210 F. Supp. 675, 688. The court also proceeded to find, *inter alia*, that "Taking into account total operation of this line, there is a profit not a loss, a benefit, not a burden," 210 F. Supp., at 688; that passenger traffic had slightly increased during the first five months of 1961; that the carrier had done little to promote the use of the passenger trains; that continued existence of the alternative of railway passenger service might be considered a necessity under such circumstances as airline strikes or bad weather; and that, in light of the overall prosperity of the Southern Railway Company, "[t]he effect of the losses of the Greensboro-Goldsboro passenger service on the financial structure of the railroad is inconsequential." [2] 210 F. Supp., at 688. On this basis, although it explicitly refused to set aside any of the subsidiary findings of fact on which the Commission's order was based, 210 F. Supp., at 689, 690, the court held that "the ultimate conclusions of the Interstate Commerce Commission that the service in question constitutes an undue burden on interstate commerce and that the present or future public convenience and necessity permits such discontinuance . . . are arbitrary and capricious because . . . not supported by

[2] It should be noted, in connection with the findings made by the District Court, that the Commission had noted that the increase in passenger traffic during 1961 was largely due to group movements of school children; that, as to Southern's failure to seek passengers, "prospective patrons who must be coaxed to use a service have no urgent need for it"; and that, after a broad study and investigation in 1959, the Commission had concluded that "public convenience and necessity" does not require the maintenance of deficit passenger services as a standby service for travelers who customarily travel by highway or by air. *Railroad Passenger Train Deficit*, 306 I. C. C. 417, 482.

substantial evidence," 210 F. Supp., at 689. The court itself then concluded that discontinuance was not warranted. It therefore set aside the Commission's order, and perpetually enjoined the carrier from discontinuing the Greensboro-Goldsboro passenger trains. The United States, the Interstate Commerce Commission, and the carrier all appealed. We noted probable jurisdiction and consolidated the cases for argument. 373 U. S. 907.

The District Court's action in setting aside the Commission's conclusions as to public convenience and necessity and undue burden on interstate commerce was explicitly based upon the court's view that the Commission had applied erroneous legal standards in reaching those conclusions. The court did not question that the Commission's subsidiary findings of fact were supported by a substantial evidentiary foundation. It simply disagreed with the Commission as to the kind of evidence required to support an order permitting discontinuance of an intrastate passenger train under § 13a (2).

The court reached its conclusion that the Commission had erred in not taking into account profits from freight operations along the Greensboro-Goldsboro line primarily in reliance upon this Court's decisions in *Public Service Comm'n of Utah* v. *United States*, 356 U. S. 421, and *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300. Both those cases dealt with § 13 (4), which requires the Commission to change intrastate rates wherever such rates are found to discriminate against interstate commerce. This Court held in those cases that the Commission could not authorize higher intrastate rates either for passenger or freight operations without first taking into account the revenues derived by the carrier from the totality of intrastate operations. In 1958, the year in which § 13a (2) was enacted, § 13 (4) was amended to

permit the Commission to act "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier . . . wholly within any State." [3] The District Court's holding that the same kind of data should be considered in § 13a (2) proceedings was premised upon the fact that no language similar to that of the § 13 (4) amendment was included in § 13a (2), and that proceedings under the latter provision, which permits discontinuance of given operations, have a far more serious impact upon intrastate passengers than proceedings under the former, which provides only for an increase in the rates to be charged.

But when § 13 (4) was amended in 1958 as a result of the two decisions relied on by the District Court, Congress was simply reaffirming what it conceived as the original intent of the section.[4] There is therefore no reason to

[3] 49 U. S. C. § 13 (4), as so amended, provides in pertinent part:

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden . . . ."

[4] "[I]t is the possible interpretation of these recent court decisions that would create a change in the present regulatory scheme." H. R. Rep. No. 2274, 85th Cong., 2d Sess., 12.

assume that Congress regarded the new language as embodying a standard which had to be specifically incorporated into every statutory provision to which it was intended to apply.

The legislative history clearly indicates that Congress in enacting § 13a (2) was addressing itself to a problem quite distinct from that reflected by overall unprofitable operation of an entire segment of railroad line. The Commission already had authority prior to 1958, under §§ 1 (18)–(20),[5] to authorize discontinuance of all services on any given intrastate line where continuance of

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[5] 49 U. S. C. § 1 (18) provides in pertinent part:

"No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

49 U. S. C. § 1 (19) provides in pertinent part:

"The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings."

49 U. S. C. § 1 (20) provides in pertinent part:

"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

such services would impose an undue burden on interstate commerce. *Colorado* v. *United States,* 271 U. S. 153. However, the Commission totally lacked power to discontinue particular trains or services while leaving the remaining services in operation. It was precisely this gap which § 13a (2) was intended to fill. *New Jersey* v. *New York, S. & W. R. Co.,* 372 U. S. 1, 5–6. As both the House and Senate Committee Reports on the legislation which became § 13a (2) make clear, Congress was primarily concerned with the problems posed by passenger services for which significant public demand no longer existed and which were consistently deficit-producing, thus forcing the carriers to subsidize their operation out of freight profits.[6] Far from permitting the carrier's need for discontinuance of passenger services to be balanced against profits from other operations conducted

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[6] "A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations.

. . . . . .

"It is obvious that in very great measure these passenger losses are attributable to commuter service. . . . It is unreasonable to expect that such service should continue to be subsidized by the freight shippers throughout the country.

"There are substantial losses, however, occurring in passenger service beyond those attributable solely to commuter service. Where this passenger service . . . cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for." H. R. Rep. No. 1922, 85th Cong., 2d Sess., 11–12.

"A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce." S. Rep. No. 1647, 85th Cong., 2d Sess., 21.

along the same line, the bill as originally reported by the Senate Committee would have required the Commission to permit discontinuance, even if there was great public need for the service, so long as the continued operation of a particular service would result in a net loss to the carrier.[7] Senator Javits unsuccessfully attempted to amend the bill on the floor of the Senate to delete the net loss standard and to substitute a requirement that the Commission balance the public need for the service against the deficit resulting from it.[8] Such an amendment, proposed by Chairman Harris of the House Interstate and Foreign Commerce Committee, was adopted by the House,[9] and accepted by the Senate in conference. The deletion of the net loss standard, however, by no means implied that freight profits along a given line could be offset against deficits incurred by passenger services for purposes of determining whether the latter constituted an undue burden on interstate operations or commerce. As Congressman Harris made clear after his amendment had been accepted, the situation "we are trying to get at" is that in which "the [freight] shippers of this country are making up a deficit every year . . . in losses in passenger service." [10]

The bill as originally reported by the Senate Committee would have applied the net loss standard to both interstate and intrastate operations, the Committee Report having concluded that state regulatory bodies required

[7] S. 3778, 85th Cong., 2d Sess., 6. See also the remarks of Senator Smathers, Chairman of the Surface Transportation Subcommittee, who made it clear that the net loss standard did not refer to all operations on a line or all operations within a State but rather to "the loss from the particular operation the railroad is rendering." 104 Cong. Rec. 10849.

[8] See 104 Cong. Rec. 10846–10849. See also pp. 10838–10839.

[9] 104 Cong. Rec. 12547–12548.

[10] 104 Cong. Rec. 12551.

"the maintenance of uneconomic and unnecessary services and facilities." [11] The bill was amended on the Senate floor to limit the Commission's discontinuance authority to interstate trains,[12] and the House version of the bill was similarly limited.[13] In conference, however, the Commission's authority over intrastate trains was restored and, except for differences in the procedures prerequisite to a hearing in the case of a wholly intrastate train,[14] the Commission was required to apply the same standard to interstate and intrastate operations in determining whether discontinuance of a train or service is justified.[15] Contrary to the suggestion of the District Court that its interpretation of § 13a (2) must be accepted to avoid "requir[ing] the intrastate operations to bear more than their share," 210 F. Supp., at 680, the statutory scheme which Congress has embodied in § 13a thus prescribes precisely the same substantive standard to govern discontinuance of either interstate or intrastate operations.[16]

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[11] S. Rep. No. 1647, 85th Cong., 2d Sess., 22.

[12] 104 Cong. Rec. 10862, 10864.

[13] H. R. 12832, 85th Cong., 2d Sess., 10.

[14] Under § 13a (2), which applies solely to intrastate trains, the Commission may not authorize discontinuance until after the appropriate state regulatory agency has been given an opportunity to act and has failed or refused to authorize discontinuance. See *New Jersey* v. *New York, S. & W. R. Co.*, 372 U. S. 1, 4.

[15] See 49 U. S. C. § 13a (1), (2).

[16] The fact that Congress intended the same substantive standards to be applied both to intrastate and interstate discontinuances wholly vitiates appellees' argument that the Commission is required to take into account, wherever presented, the profitability of intrastate operations as a whole or any segment thereof whenever an intrastate service is sought to be discontinued. Thus, consideration of the overall prosperity of the carrier is necessarily relevant to a determination of the degree to which a deficit resulting from a given service constitutes an undue burden on interstate commerce. But neither the

All that need properly be considered under this standard, as both the language and history of § 13a (2) thus make abundantly clear, is what effect the discontinuance of the specific train or service in question will have upon the public convenience and necessity and upon interstate operations or commerce. As the Commission has correctly summed up the matter in another case:

> "The burden [upon the carrier's interstate operations or upon interstate commerce, as expressed in section 13a (2)] . . . is to be measured by the injurious effect that the continued operation of the train proposed for discontinuance would have upon interstate commerce. As is indicated by its legislative history, the purpose of section 13a (2) is to permit the discontinuance of the operation of services that 'no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses involved.' (S. Rep. 1647, 85th Cong.). Nowhere in section 13a (2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress." *Southern Pac. Co., Partial Discontinuance*, 312 I. C. C. 631, 633–634 (1961).

This Court has long recognized that the Commission may properly give varying weights to the overall pros-

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profitability of such freight operations as are fortuitously conducted on the same line as a given passenger service nor the profitability of all operations within any given State bears any practical relationship either to the public's need for the service in question or to the burden which the deficit imposes on interstate commerce.

perity of the carrier in differing situations. Thus, in *Colorado* v. *United States,* 271 U. S. 153, which also involved a situation in which the Commission was required to balance public convenience and necessity against undue burdens on interstate commerce, it was specifically noted that "In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases . . . the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier." 271 U. S., at 168–169. In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services. But where, as here, the Commission's findings make clear that the demands of public convenience and necessity are slight and that the situation is, therefore, one falling within the first category delineated in *Colorado,* it is equally proper for the Commission, in determining the existence of the burden on interstate commerce, to give little weight to the factor of the carrier's overall prosperity.

Whatever room there may be for differing views as to the wisdom of the policy reflected in § 13a (2), it is the duty of the Commission to effectuate the statutory scheme. We cannot agree with the District Court that the Commission departed in any respect from that duty

here. We therefore reverse the judgment of the District Court and remand with instructions to reinstate the report and order of the Commission.

Reversed.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, dissenting.

This case involves more than the fate of the 6:10 between Greensboro and Goldsboro, North Carolina. It is the first litigation to reach this Court concerning the criteria to be applied by the Interstate Commerce Commission in proceedings seeking discontinuance of intrastate passenger trains under § 13a (2) of the Interstate Commerce Act, 72 Stat. 571, 49 U. S. C. § 13a (2). This section provides that where a State has failed or refused to allow discontinuance of an intrastate passenger train, the ICC may authorize the intrastate discontinuance if it finds "that (a) the present or future public convenience and necessity permit of such discontinuance . . . and (b) the continued operation . . . will constitute an unjust and undue burden upon the interstate operations of such carrier . . . or upon interstate commerce." The Court sustains the ICC in interpreting this provision to mean that, in determining whether an unprofitable intrastate passenger train shall be discontinued, the Commission need give: (1) "little or no weight" to the overall prosperity of the carrier, *ante*, at 96, and (2) no consideration whatsoever to the profitability of "the intrastate operations of the carrier as a whole, or any particular segment thereof," *ante*, at 104.[1] In my view the standards employed by the Commission were not the proper ones. Consequently, without intimating any opinion as to the merits of the discontinuance application, I would remand the

[1] See the statement of the hearing examiner set forth in note 4, *infra*.

case to the Commission for further consideration and appropriate findings. See, *e. g., Interstate Commerce Comm'n* v. *J–T Transport Co., Inc.,* 368 U. S. 81, 93.

Since "[p]assenger deficits have become chronic in the railroad industry," *Chicago, M., St. P. & P. R. Co.* v. *Illinois,* 355 U. S. 300, 307, the Court's decision will allow the Commission to authorize the Nation's railroads to discontinue virtually all intrastate passenger service—including most commuter services. It is difficult to conceive of a situation in this era of widespread bus, airline and automobile transportation in which the Commission cannot find that alternative services are more or less available to handle the diminished railroad passenger traffic. Such a finding coupled with a "net loss" on the passenger trains will meet the discontinuance standard approved by the Court. The Court concludes that this result has been mandated by Congress. If this were so, there would be no basis for dissent, since I agree entirely with the Court that "[w]hatever room there may be for differing views as to the wisdom of the policy . . . , it is the duty of the Commission [and the Court] to effectuate the statutory scheme." *Ante,* at 105. I do not believe, however, that it can be fairly concluded from the statute or from its legislative history that Congress intended, despite the ruling of a state authority, that intrastate passenger trains could be discontinued on the basis of the slender showing required by the ICC and approved by this Court.

The case turns upon the language and purpose of § 13a (2) of the Interstate Commerce Act. This section was first enacted as part of the Transportation Act of 1958. It is true, as the Court points out, that this legislation reflects concern with "the worsening railroad situation." *Ante,* at 101, n. 6. But it is far from accurate to conclude that Congress was oblivious of the needs of the passenger public and of the primary responsibility of

state commissions for the regulation of purely intrastate service. Under §13a (2) a railroad seeking to discontinue an intrastate passenger train, as distinguished from an interstate operation, must first apply to the appropriate state commission. Only after the state commission has been given the opportunity and has failed or refused to act is the ICC authorized to intervene. The Commission may reverse the decision of the state agency only upon findings, supported by substantial evidence, that the service is not required by public convenience and necessity *and* that its continuance will constitute "an unjust and undue burden . . . upon interstate commerce." Senator Smathers, one of the bill's sponsors, explained that § 13a (2):

> "protected the right of the States, . . . by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce." 104 Cong. Rec. 15528.

In this case the State of North Carolina points out that between 1951 and 1956, of 44 requests for discontinuance of intrastate passenger trains, some emanating from appellant Southern Railway, 42 were approved by the State. Indeed, on the line between Greensboro and Goldsboro, Southern operated three pairs of passenger trains until September 1954. The State, on Southern's application, authorized discontinuance of one pair of trains in 1954 and another pair in 1958. The two trains in question, No. 13 and No. 16, are the last remaining pair of east-west passenger trains between the two communities. They are the only interconnecting service at Greensboro for passengers from Goldsboro and intermediate points with north-south trains on Southern's main line. For such passengers, they furnish a convenient overnight pullman

service to Washington, New York and other east coast cities and conserve working time for the traveler having business at the north or south terminal cities. Trains 13 and 16 run on tracks leased by Southern from the state-owned North Carolina Railroad Company. The lease clearly contemplates both passenger and freight service. Furthermore, as the Court recites in its opinion, while during the relevant year Southern sustained a loss on its passenger service on the line of approximately $90,000, it made a profit of over $600,000 on freight on the same leased line and an overall profit on its entire system in excess of $36,000,000. While passenger traffic on this line has declined in recent years, the traffic is still substantial—14,776 passengers used the two trains in 1960, an increase of more than 500 over the previous year—and the area served has been growing in population and industrial importance. On these facts, the state agency denied Southern's request to discontinue the two trains. In overruling the decision of the State, the ICC, as already stated, gave "little or no weight" to Southern's overall prosperity and no consideration whatsoever to its freight profits on the line. In my view, the Commission wrongfully ignored these factors and the Court errs in approving this action of the Commission.

I read the Act and its history to require the Commission to take into account all material factors established by evidence presented by the parties and bearing on the issues of public need and burden on interstate commerce. The three-judge District Court properly observed that these issues are "not susceptible of scientific measurement or exact formulae but are questions of degree and involve the balancing of conflicting interests." 210 F. Supp. 675, 684. I cannot comprehend how the Commission can achieve a proper balance without fully considering the railroad's relevant profit data. The issues—whether the public need will allow discontinuance of the

passenger service and whether continued operation will unduly burden interstate commerce—are interrelated. Under any common-sense view of the statute, the amount of the railroad's financial loss on the two intrastate passenger trains cannot be considered in isolation from its freight profits on that line, its intrastate profits, or its overall prosperity. The words "unjust" and "undue" clearly indicate that Congress intended that the mere fact that a particular passenger train is operating at a loss—*i. e.*, is a burden—would not in itself justify discontinuance of that train. The burden must be "unjust" and "undue," and whether this is so cannot be determined except in light of the total circumstances. The final determination must be made by balancing all the relevant factors —"the effort being to decide what fairness to all concerned demands." *Colorado* v. *United States*, 271 U. S. 153, 169. As the decisions of this Court plainly indicate, this does not mean that discontinuance is prohibited unless intrastate passenger and freight service considered together show a net loss or overall profits are substantially impaired. *Colorado* v. *United States, supra; Transit Comm'n* v. *United States*, 284 U. S. 360. Rather, freight profits and overall profits are merely factors to be considered by the Commission in determining whether the particular passenger loss constitutes an unjust and undue burden on interstate commerce when balanced against the public need.[2] Such profits may not be the controlling factors but, when presented, they are to be considered.

[2] See *Colorado* v. *United States*, 271 U. S. 153, 168–169 (Brandeis, J.): "In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to

The Court dealt with an aspect of the intrastate passenger problem in *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300, and *Public Service Comm'n of Utah* v. *United States*, 356 U. S. 421. These cases involved the construction of § 13 (4) of the Interstate Commerce Act which authorizes the Commission to change intrastate rates whenever such rates discriminatorily burden interstate commerce. In the *Chicago* case the Court said:

> "[W]e do not think that the deficit from this single commuter operation can fairly be adjudged to work an undue discrimination against the Milwaukee Road's interstate operations without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger. The basic objective of § 13 (4), applied in the light of § 15a (2) to this case, is to prevent a discrimination against the carrier's interstate traffic which would result from saddling that traffic with an undue burden of providing intrastate services. A fair picture of the intrastate operation, and whether the intrastate traffic unduly discriminates against interstate traffic, is not shown, in this case, by limiting consideration to the particular commuter service in disregard of the revenue contributed by the other intrastate services." 355 U. S., at 307–308.

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serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the Act does not make issuance of the certificate dependent upon a specific finding to that effect."

The major premise of the opinion of the Court today, however, is that Congress expressly overruled the *Chicago* and *Public Service Commission* cases by amending § 13 (4) in the Transportation Act of 1958. It is, of course, true that § 13 (4) was amended after these decisions to allow the ICC to determine that intrastate railway rates discriminated against interstate commerce "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier . . . wholly within any State." 72 Stat. 570, 49 U. S. C. § 13 (4). I cannot agree, however, with the Court's view that Congress by so amending § 13 (4), which deals solely with rate cases, intended that there be read into § 13a (2), which deals solely with discontinuances, language which was not similarly incorporated. Section 13a (2) was initially enacted at the same time that § 13 (4) was amended. If Congress had intended that the ICC need not consider all relevant factors in discontinuance cases, the proposed § 13a (2) could easily have been altered to include the language that was added to § 13 (4) by amendment.

In any event, even if the differing language is to be understood as importing the same standards, it seems to me that the Court reads the amendment to § 13 (4) too broadly. The legislative history shows that Congress intended the amendment to allow the ICC to make a decision under § 13 (4) without considering the totality of the carrier's operations when the parties have not presented these facts to the Commission. When these data are presented, however, and put in issue the amended section would not permit the Commission to ignore the evidence. The amendment provides that the Commission may make its determination without a separation of revenues. The permissive "may," read in light of the legislative history, reflects the intent of Congress "that

a decision of the Commission will not be upset simply because it fails to find specifically these facts where they have not been put in issue by the evidence before the Commission, but this does not mean that such facts where relevant and pertinent are not to be considered." 210 F. Supp. 675, 682. This interpretation of the amendment is supported by this Court's affirmance of the decision of the three-judge District Court in *Utah Citizens Rate Assn.* v. *United States,* 192 F. Supp. 12, aff'd *per curiam,* 365 U. S. 649. The District Court there said:

> "We believe that a matter of procedure rather than any substantive change in the basic transportation policy of the Congress is involved. If this were not so, serious conceptual and constitutional, and further practical difficulties, would be invited. But there seems no reason why Congress cannot provide or clarify a procedural factor to render more practical the formula it has theretofore established, and which was, under existing law appropriately considered by the majority in [*Public Service Comm'n of Utah* v. *United States,* 356 U. S. 421]. In our opinion the amendment in this area does no more than to obviate the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view. There is nothing therein inconsistent with the further recognition that to rebut the prima facie presumption resulting from the amendment those who claim intrastate traffic as a whole is not discriminating against interstate commerce may show as an affirmative matter favorable aspects of intrastate operations. The dissent-

ing opinion to this effect referred to the then pending bill couched in the same language as that later adopted in the Transportation Act of 1958, and the Committee, considering the pending legislation, cited the dissenting opinion with apparent approval." [3] 192 F. Supp., at 18–20.

The dissenting opinion referred to by the court had said:

"Of course, those who contend that intrastate traffic as a whole is not discriminating against interstate traffic may come forward and show, as they may in respect to any claimed dissimilarity of conditions surrounding interstate and intrastate traffic, some favorable aspect of intrastate operations that the Commission should take into account. In the absence of such a showing, however, the Commission should be able to assume that discrimination shown to exist as to the particular segments of intrastate and interstate traffic with which the § 13 (4) proceeding is concerned is not offset by other conditions that this Court speculates may affect wholly different segments of intrastate commerce." *Public Service Comm'n of Utah* v. *United States, supra,* at 462–463.

It necessarily follows that if § 13 (4), with its amendatory language, does not permit the Commission to ignore evidence of all relevant facts actually offered by the parties in a rate case, such evidence cannot be disregarded in a discontinuance proceeding under § 13a (2) which lacks even the amending language.

Finally, the legislative history of § 13a (2) plainly demonstrates that the Court has mistaken the intent of Congress. The bill initially considered by the Senate

[3] See the Conference Report, H. R. Rep. No. 2274, 85th Cong., 2d Sess.

provided that discontinuance would be denied and the continuance approved if the Commission found that:

> "the operation or service of such train . . . is required by public convenience and necessity *and that such operation or service will not result in a net loss therefrom to the carrier or carriers* and will not otherwise unduly burden interstate or foreign commerce . . . ." S. 3778, 85th Cong., 2d Sess. (Emphasis added.)

As the Court notes in its opinion, Senator Javits opposed this "net loss" standard. *Ante,* at 102. The Court, however, misses the import of Senator Javits' view, which, since it ultimately prevailed, is highly significant. The Senator objected on the ground that the net loss criterion would authorize the discontinuance of any intrastate commuter train which, considered by itself, showed a net loss. He noted that under the proposal, whenever a net loss was shown, discontinuance could follow regardless of whether that loss unduly burdened interstate commerce. The Senator analyzed the proposed bill in a manner most relevant to the present case:

> "It is my view, as the bill is now written, that question of law [as to the meaning of 'net loss therefrom'] will be decided in terms of a net loss on the particular section of a railroad which is sought to be discontinued, rather than the net loss on the total operations of the carrier of which that section of the road is a part." 104 Cong. Rec. 10847.

Senator Javits concluded that the bill should be amended to insure that the ICC be given a "balanced authority to deal with the situation, *both* in respect to losses *and* in respect to the public in the way of convenience and necessity." *Id.,* at 10848. (Emphasis added.) Senator Smathers, a sponsor of the proposed bill, did not deny the accuracy of Senator Javits' interpretation. Indeed,

Senator Smathers responded: "We construe the words 'net loss' to mean the loss from the particular operation the railroad is rendering." *Id.*, at 10849. Although Senator Javits was initially unsuccessful in his efforts to defeat the passage of the net loss provision, his arguments prevailed, as the Court notes, both in the House and in the final bill.

On the floor of the House, Representative Harris, Chairman of the House Interstate and Foreign Commerce Committee, offered an amendment deleting the net loss clause. It was argued that the bill would:

> "without this amendment, put the public entirely at the mercy of the railroad by establishing a new standard for the discontinuance of train service by a mere showing of a loss in the operation of any train. . . . We cannot go so far afield as to say that unless every single item of service shows a profit the railroad can discontinue any service regardless of public convenience and necessity." *Id.*, at 12547–12548.

The deleting amendment prevailed in the House, and at Conference the "net loss" provision of the Senate bill was abandoned in favor of the House proposal. Congress, therefore, in acting on the recommendations of Senator Javits and Congressman Harris specifically rejected the proposed net loss standard. The Court today, however, appears to adopt in substantial measure the rejected standard.[4] If, as the Court holds, the Commission need

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[4] The report of the hearing examiner, which was accepted by the Commission and is now approved by the Court, made it clear that a net loss standard was utilized:

"At the hearing, protestants emphasized the fact that petitioner's net railway operating income in 1960 was $36,107,599, and that its net income alone from freight operations on the line between Greensboro and Goldsboro averages $630,000, thus contending that the overall prosperity of the petitioner, as well as its intrastate freight opera-

give "little or no weight" to the overall prosperity of the carrier and no consideration whatever to the profitability of its total intrastate operations, it would seem that the governing criterion in determining whether interstate commerce is unduly burdened is the "net loss" on a particular passenger train.[5] This certainly does not allow the

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tions, must be given effect in the disposition of the issues involved herein. With these contentions, the examiner disagrees. The legislative history of section 13a (2) indicates that the purpose thereof is to permit the discontinuance of the operation of services that *'no longer pay their way* and for which there is no longer any public need to justify the heavy financial losses involved.' (S. Rep. 1647, 85th Cong.). (Emphasis supplied). In considering a somewhat similar contention, in *Southern Pacific Co.—Partial Discontinuance of Passenger Trains, Los Angeles, etc.* [312 I. C. C. 631], the Commission made the following pertinent statement:

" 'Nowhere in section 13a (2) or elsewhere in the law is there any requirement that the prosperity of the intrastate operations of the carrier as a whole, or any particular segment thereof, must be given effect in determining whether the operation of an individual intrastate train imposes an unjust and undue burden on interstate commerce. To hold otherwise would be contrary to the apparent intent of the Congress.'

"In this same connection, the argument that losing passenger operations must be supported by constantly increasing freight rates is also untenable. In rejecting this argument, the Commission stated that such 'theory of regulation would not be consonant with the national transportation policy, and would be fraught with disastrous possibilities.' *Great Northern Ry. Co. Discontinuance of Service,* 307 I.C.C. 59, 61. Similarly, the fact that petitioner's system operations are profitable is entitled to little or no weight. . . ."

[5] This does not imply that either the Commission or the Court has failed to acknowledge that a carrier must show that public convenience and necessity will permit the requested discontinuance. However, as I have indicated, *supra,* at 107, unless the Commission relates this finding as to public convenience to an appropriate consideration of the burden issue, the availability of alternative means of transportation coupled with the fact of losses on diminished passenger traffic will suffice to sanction discontinuances in virtually all cases.

ICC "a balanced authority to deal with the situation, *both* in respect to losses *and* in respect to the public in the way of convenience and necessity."

The result intended by Congress certainly cannot be achieved by allowing the Commission to make a final ruling on a discontinuance application without considering the question of undue or unjust burden.[6] A "balanced authority" for the ICC surely means that before overriding state action and authorizing the discontinuance of a wholly intrastate passenger train, the Commission must consider all substantial evidence presented by the parties and bearing upon whether the discontinuance is consistent with public necessity *and* whether the continued operation will constitute an unjust and undue burden upon interstate commerce. In making this determination the factors for the Commission to consider necessarily include the character and population of the territory served; the passenger traffic or lack of it; the alternative transportation facilities; the losses on the passenger operation as compared with the revenue from freight on the particular line and the revenue from intrastate business as well as the profitability of the railroad as a whole.[7]

The requirement that the Commission consider such factors certainly does not mean that it is precluded from

[6] *Colorado* v. *United States*, 271 U. S. 153, 168, "The benefit . . . of the abandonment must be weighed against the inconvenience . . . . Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce."

[7] The conclusion that § 13a (2) contemplates the weighing of such factors is reinforced by the use of the same balancing approach under §§ 1 (18), 1 (20), of the Interstate Commerce Act, 41 Stat. 477, 478, as amended, 49 U. S. C. §§ 1 (18), 1 (20). These provisions, enacted in 1920, empower the ICC to permit abandonment of lines (as distinguished from particular trains), where continued operation of the

authorizing the abandonment of an uneconomic passenger train because the remainder of the railroad's intrastate or overall operations are profitable.[8] It means only that in making its determination the Commission shall give appropriate consideration to all relevant factors. One factor or a combination may prove controlling but all must be considered in making the statutory determination. This the Commission refused to do and, therefore, its isolated finding that public convenience and necessity would permit a discontinuance was insufficient, absent an appropriate consideration of the burden on commerce, to sustain its conclusion.

Although I agree, for the reasons stated, with the three-judge District Court in its interpretation of § 13a (2), I am nevertheless of the view that that court misconstrued its reviewing role in finding that the operation of the two trains between Greensboro and Goldsboro served the public need and constituted no burden on interstate commerce. The court should not have determined this issue on the record before it but should have remanded the case for further proceedings by the Commission under the correct legal standard. See, *e. g., Interstate Commerce Comm'n* v. *J–T Transport Co., Inc.*, 368 U. S. 81, 93.

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entire intrastate line would burden interstate commerce. See *Colorado* v. *United States, supra; Transit Comm'n* v. *United States*, 284 U. S. 360.

[8] The ICC has never been precluded from authorizing abandonment of an uneconomic branch line (as distinguished from the particular trains) merely because the remainder of the railroad's intrastate operations were profitable. See note 7, *supra*.

COSTELLO *v.* IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 83. Argued December 12, 1963.—Decided February 17, 1964.

Petitioner, while a naturalized citizen, was convicted of two separate offenses involving moral turpitude. Following his subsequent denaturalization on the ground that his citizenship had been acquired by willful misrepresentation, proceedings were brought against him under § 241 (a) (4) of the Immigration and Nationality Act of 1952, which provides for deportation of an alien who at any time after entry "is convicted" of two crimes involving moral turpitude. He was found deportable and the Court of Appeals dismissed his petition for review. *Held:*

1. The two convictions relied upon to support deportation both occurred at a time when petitioner was a naturalized citizen and he was therefore not deportable, the statute permitting only deportation of one who was an alien at the time of his convictions. *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, distinguished. Pp. 121–128.

2. The provision in § 340 (a) of the Act that a denaturalization order shall be effective as of the original date of naturalization is inapplicable to the general deportation provisions of the Act. Petitioner could not, therefore, under the "relation-back" theory of that provision be deemed to have been an alien at the time of his convictions. Pp. 128–132.

311 F. 2d 343, reversed.

Edward Bennett Williams argued the cause for petitioner. With him on the briefs was *Harold Ungar*.

Wayne G. Barnett argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Stephen J. Pollak* and *Beatrice Rosenberg*.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 241 (a)(4) of the Immigration and Nationality Act of 1952 provides that "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . at any time after entry is convicted of two crimes involving moral turpitude . . . ." [1] The single question to be decided in the present case is whether this provision applies to a person who was a naturalized citizen at the time he was convicted of the crimes, but was later denaturalized.

The petitioner, born in Italy in 1891, was brought to the United States when he was four years old and has lived here ever since. He became a naturalized citizen in 1925. In 1954 he was convicted of two separate offenses of income tax evasion, and the convictions were ultimately affirmed by this Court. *Costello* v. *United States,* 350 U. S. 359. In 1959 his citizenship was revoked and his certificate of naturalization canceled on the ground that his citizenship had been acquired by willful misrepresentation. This Court affirmed the judgment of denaturalization. *Costello* v. *United States,* 365 U. S. 265.

In 1961 the Immigration and Naturalization Service commenced proceedings to deport the petitioner under § 241 (a)(4), and it is those proceedings which have cul-

[1] "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . . . . .

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;" 66 Stat. 204, as amended, 8 U. S. C. § 1251 (a)(4).

minated in the case now before us. The Special Inquiry Officer found the petitioner deportable; the Board of Immigration Appeals affirmed; and the Court of Appeals dismissed the petition for review, holding that the petitioner was subject to deportation under § 241 (a)(4) even though the two convictions relied upon to support deportation both occurred at a time when he was a naturalized citizen. 311 F. 2d 343. We granted certiorari to consider an important question of federal law.[2] For the reasons which follow, we reverse the judgment of the Court of Appeals.

At a semantic level, the controversy centers around the use of the present tense "is" in the clause "[[a]ny alien] who at any time after entry *is* convicted . . . ." The petitioner argues that this language permits deportation only of one who was an alien at the time of his convictions. The Court of Appeals totally rejected such a contention, holding that this statutory language, considered along with the phrase "at any time after entry" and with the broad legislative history, clearly permits deportation of a person now an alien who was convicted of the two crimes in question while he was a naturalized citizen. "There is no ambiguity," the court wrote, and "no room for interpretation or construction." 311 F. 2d, at 345. The court found additional support for its conclusion in *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, a case which held that under a 1920 deportation law aliens who had been convicted of specified offenses were deportable even though the convictions had occurred at a time when the aliens held certificates of naturalization.

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[2] The grant of certiorari was "limited to Question 1 presented by the petition which reads as follows:

" 'Whether the provision of § 241 (a)(4) of the Immigration and Nationality Act of 1952 for deportation of an "alien . . . who at any time after entry is convicted of two crimes" applies to an individual who was a naturalized citizen when convicted.' " 372 U. S. 975.

We take a different view. The statute construed in *Eichenlaub* differs from § 241 (a)(4) in several important respects. The law there involved was the Act of May 10, 1920, which provided that "All aliens who since August 1, 1914, have been or may hereafter be convicted" of violations of the Espionage Act of 1917, as amended, were to be deported, provided the Secretary of Labor after a hearing found them to be undesirable residents of the United States.[3] The Court read this language as unambiguously authorizing deportation, regardless of the aliens' status at the time they were convicted. It is evident from what was said in the opinion that the Court was aided considerably in its search for the proper construction of the statute by Congress' use of the past tense in the phrase "have been or may hereafter be," and the fact that the only limitation which Congress placed upon the time of conviction was that it be "since August 1, 1914."[4] The

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[3] The relevant paragraphs of the Act of May 10, 1920, read as follows:

". . . That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported . . . if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

"(1) All aliens who are now interned under section 4067 of the Revised Statutes . . . .

"(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts . . . namely:

"(a) An Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws . . .'" 41 Stat. 593–594. See 8 U. S. C. § 157 (1926 ed.).

[4] "The proper scope of the Act of 1920 as applied to these cases is found in the ordinary meaning of its words." 338 U. S., at 527. "The statutory language which says that 'aliens who since August 1, 1914, *have been or may hereafter be convicted* . . .' (emphasis sup-

Court also found specific legislative history to support its conclusion. As the Congressional Committee Reports demonstrated, the 1920 law was a special statute dealing with sabotage and espionage, originally enacted in order to deport "some or all of about 500 aliens who were then interned as dangerous enemy aliens and who might be found, after hearings, to be undesirable residents, and also to deport some or all of about 150 other aliens who, during World War I, had been convicted of violations of the Espionage Act or other national security measures, and who might be found, after hearings, to be undesirable residents." 338 U. S., at 532. The Court therefore concluded that Congress, when it enacted the statute, had expressed a clear intent to group together denaturalized citizens along with aliens who had never acquired citizenship and to deport them for specific crimes involving national security occurring after a specific date at the beginning of World War I.

Neither the language nor the history of § 241 (a)(4) lends itself so easily to a similar construction. The subsection employs neither a past tense verb nor a single specific time limitation. The petitioner's construction—that the language permits deportation only of a person who was an alien at the time of his convictions, and the Court of Appeals' construction—that the language permits deportation of a person now an alien who at any time after entry has been convicted of two crimes, regardless of his status at the time of the convictions—are both possible readings of the statute, as the respondent has conceded in brief and oral argument.

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plied) refers to the requirement that the deportations be applicable to all persons who had been convicted of certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920." 338 U. S., at 530.

We agree with the Court of Appeals that the tense of the verb "be" is not, considered alone, dispositive.[5] On the other hand, we disagree with that court's reliance on the phrase "at any time after entry" in § 241 (a)(4) to support the conclusion that an alien is deportable for post-entry conduct whether or not he was an alien at the time of conviction. Since § 212 (a)(9) [6] provides for the *exclusion* of aliens convicted of crimes of moral turpitude, and any excludable alien who nevertheless enters the country is deportable under § 241 (a)(1),[7] it seems just as logical to conclude that the purpose of the phrase "at any time after entry" in § 241 (a)(4) was simply to make clear that § 241 (a)(4) authorizes the deportation of aliens who were not originally excludable, but were convicted after entry.

There is nothing in the legislative history of § 241 (a)(4) of so specific a nature as to resolve the ambiguity of the statutory language. The general legislative purpose underlying enactment of § 241 (a)(4) was to broaden the provisions governing deportation, "particularly those referring to criminal and subversive aliens." [8] But refer-

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[5] Comparing the "is" of § 241 (a)(4) with the various forms of "be" employed in other subsections of § 241 (a) is hardly helpful. It is as likely that the differences in wording found in these subsections reflect differences in style attributable to the various antecedents of the several provisions, as it is that the use of the present tense in § 241 (a)(4) reflects a specific congressional intent that that particular subsection, in contrast to the others, was not to be applied to people in the petitioner's position.

[6] 8 U. S. C. § 1182 (a)(9).

[7] 8 U. S. C. § 1251 (a)(1).

[8] See Commentary on the Immigration and Nationality Act, Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, 8 U. S. C. A., pt. I, p. 61. This commentator makes no reference to the problem before us, although he does refer to several innovations in the Act broadening its scope: "Many of the grounds

ence to such a generalized purpose does little to promote resolution of the specific problem before us, of which there was absolutely no mention in the Committee Reports or other legislative materials concerning § 241 (a)(4).[9]

Although no legislative history illumines our problem, considerable light is forthcoming from another provision of the statute itself. Section 241 (b)(2), made specifically applicable to § 241 (a)(4), provides that deportation shall not take place "if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation . . . that such alien not be deported." [10] As another court has correctly ob-

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for deportation specified in the new law are retroactive in effect. They apply to the alien notwithstanding the fact that he may have entered the United States prior to the enactment of the 1952 law. Also, he may be found now to be deportable by reason of facts which occurred prior to the enactment of this Act [June 27, 1952]." Besterman, *ibid.*

[9] See H. R. Rep. No. 1365, 82d Cong., 2d Sess., 60 (1952); S. Rep. No. 1515, 81st Cong., 2d Sess., 390–392 (1950); S. Rep. No. 1137, 82d Cong., 2d Sess., 21 (1952); H. R. Rep. No. 2096 (Conference Report), 82d Cong., 2d Sess., 127 (1952). See also Immigration and Naturalization Service, Analysis of S. 3455, 81st Cong., 2d Sess. (1950), Vol. 5, pp. 241–3 through 241–6; and Analysis of S. 716, 82d Cong., 1st Sess. (1951), Vol. 4, pp. 241–2 through 241–4. See generally, Besterman, note 8, *supra*, pp. 1–91.

[10] "The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter." 8 U. S. C. § 1251 (b).

served, "It seems plain that the qualifying provisions of subsection (b) are an important part of the legislative scheme expressed in subsection (a) (4). While that section makes a conviction there referred to ground for deportation, it is qualified in an important manner by the provision of subsection (b) (2) that if the court sentencing the alien makes the recommendation mentioned, then the provisions of subsection (a) (4) do not apply." *Gubbels* v. *Hoy*, 261 F. 2d 952, 954.[11]

Yet if § 241 (a)(4) were construed to apply to those convicted when they were naturalized citizens, the protective provisions of § 241 (b)(2) would, as to them, become a dead letter. A naturalized citizen would not "at the time of first imposing judgment or passing sentence," or presumably "within thirty days thereafter," be an "alien" who could seek to invoke the protections of this section of the law. Until denaturalized, he would still be a citizen for all purposes, and a sentencing court would lack jurisdiction to make the recommendation provided by § 241 (b)(2).[12] We would hesitate long before adopting a construction of § 241 (a)(4) which would, with respect to an entire class of aliens, completely nul-

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[11] In *Gubbels* the Court of Appeals for the Ninth Circuit held that court-martial convictions could not provide a basis for deportation under § 241 (a)(4) because a military court is not so constituted as to make the privilege accorded by § 241 (b)(2) available to a convicted alien.

[12] It has been suggested that the petitioner, or one similarly situated, was at the time of the conviction chargeable with knowledge that he had procured his naturalization illegally, and that he could have therefore proceeded to seek a recommendation from the sentencing judge under § 241 (b)(2). This suggestion seems not only practically unrealistic, but technically untenable. It has been held that only a competent court in appropriate proceedings can nullify a status of naturalized citizenship. *United States* v. *Stephan*, 50 F. Supp. 445.

lify a procedure so intrinsic a part of the legislative scheme.[13]

If, however, despite the impact of § 241 (b)(2), it should still be thought that the language of § 241 (a)(4) itself and the absence of legislative history continued to leave the matter in some doubt, we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner. As the Court has emphasized, "deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U. S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

Adoption of the petitioner's construction of § 241 (a)(4) does not end our inquiry, however, for the respondent urges affirmance of the finding of deportability on an alternative ground, not reached by the Court of Appeals. The argument is that the petitioner is deportable because § 340 (a) of the Immigration and Nationality Act of 1952, under which the petitioner's citizenship was canceled, provides that an order of denaturalization "shall be effective as of the original date" of the naturalization

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[13] The *Eichenlaub* statute carried with it no such qualifying provision, which reinforces the conclusion that the decision in *Eichenlaub* is of no basic relevance to the issue here. See note 3, *supra*. Section 19 of the Immigration Act of 1917, 39 Stat. 874, the predecessor of § 241 (a)(4), on the other hand, did contain a relief provision similar to § 241 (b)(2). See 39 Stat. 889–890.

order.[14] Under this so-called "relation-back" theory, it is said that cancellation of the petitioner's certificate of naturalization was "effective" as of 1925, the year of his original naturalization, that he was therefore an alien as a matter of law at the time of his convictions in 1954, and that he is accordingly deportable under § 241 (a)(4) even if that provision requires alienage at the time of the convictions.

We reject this theory for much the same reasons which have prompted our construction of § 241 (a)(4). There is nothing in the language of § 340 (a), and not a single indication in the copious legislative history of the 1952 Act, to suggest that Congress intended the relation-back language of § 340 (a) to apply to the general deportation provisions of the Act. In view of the complete absence of any indication to the contrary, it would appear that in adopting the relation-back language of § 340 (a) Congress intended to do no more than to codify existing case law. Several cases before 1952 had held that an order of denaturalization made the original naturalization a nullity, *Johannessen* v. *United States*, 225 U. S. 227, and that, for the purpose of determining rights of derivative citizenship, denaturalization related back to the date of naturalization. *Battaglino* v. *Marshall*, 172 F. 2d 979, 981; *Rosenberg* v. *United States*, 60 F. 2d 475.

The Second Circuit was alone among the federal courts in thinking that this *nunc pro tunc* concept which had

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[14] "It shall be the duty of the United States district attorneys for the respective districts . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization . . . , and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . . ." 66 Stat. 260, 8 U. S. C. § 1451 (a).

been judicially developed in the denaturalization cases could properly be related to the task of construing a deportation statute. *Eichenlaub* v. *Watkins*, 167 F. 2d 659; *Willumeit* v. *Watkins*, 171 F. 2d 773. And when those cases came here, this Court pointedly declined to adopt the Second Circuit's reasoning. *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 529–530.[15] Following this Court's decision in *Eichenlaub*, the Sixth Circuit expressly refused to apply to a general deportation statute the relation-back principle of the denaturalization cases, in determining when there had been an "entry" for purposes of the predecessor of § 241 (a)(4) in the 1917 Act. *Brancato* v. *Lehmann*, 239 F. 2d 663.[16]

The relation-back concept is a legal fiction at best, and even the respondent concedes that it cannot be "mechanically applied." With respect to denaturalization itself, Congress clearly adopted the concept in enacting § 340 (a). But in the absence of specific legislative history to the contrary, we are unwilling to attribute to Congress a purpose to extend this fiction to the deportation provisions of § 241 (a)(4). This Court declined to apply the fiction in a deportation context in the *Eichenlaub* case, and we decline to do so now.

The argument is made that it is anomalous to hold that a person found to have procured his naturalization by willful misrepresentation is not subject to deportation,

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[15] The companion case, *Willumeit* v. *Shaughnessy*, was decided in the same opinion. 338 U. S. 521.

[16] Brancato first entered the United States in 1914; he was naturalized in 1929; he then left the United States and returned in 1930; he was convicted of a crime involving moral turpitude in 1932; he was denaturalized in 1939. The question was whether his conviction in 1932 was within five years after an "entry," as defined by the statute. The Court of Appeals held that the cancellation of his citizenship in 1939 related back to 1929 for purposes of denaturalization, but not for purposes of the deportation statute, and that his return to the United States in 1930 was therefore not an "entry" in that year.

although he would be deportable if he had never been naturalized at all. But it is not at all certain that this petitioner *would* be deportable today if he had never acquired naturalized citizenship. The petitioner points out that if he had held alienage status at the time of his trial for income tax evasion, he could have offered to plead guilty to one count of the indictment in return for a *nolle prosequi* of the other counts, and that conviction on but one count would not have made him subject to deportation under § 241 (a)(4). Even more important, had petitioner been an alien at the time of his convictions, he could have availed himself of the supplementary relief procedure provided for in § 241 (b)(2). In other words, to hold that under the relation-back language of § 340 (a) the petitioner was an "alien" at the time of his convictions would go much further than merely preventing him from benefiting from his invalid naturalization; it would put him in a much more disadvantageous position than he would have occupied if he had never acquired a naturalization certificate at all.

Moreover, if the relation-back doctrine were applicable in this case, it would be applicable as well, as the respondent's counsel conceded in oral argument, in the case of one whose original naturalization was not fraudulent, but simply legally invalid upon some technical ground.[17] In this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities. The reality is that the petitioner's convictions occurred when he

[17] Section 340 (a) was amended in 1961 to provide for cancellation of citizenship on the ground that it was "illegally procured." Act of September 26, 1961, § 18, 75 Stat. 656. In *Brancato* v. *Lehmann*, 239 F. 2d 663, the appellant's citizenship had been canceled because his original petition for naturalization "was not verified by the affidavits of two credible witnesses," as required by the 1906 Act.

was a naturalized citizen, as he had been for almost 30 years.

If Congress had wanted the relation-back doctrine of § 340 (a) to apply to the deportation provisions of § 241 (a)(4), and thus to render nugatory and meaningless for an entire class of aliens the protections of § 241 (b)(2), Congress could easily have said so. But there is no evidence whatever that the question was even considered. If and when Congress gives thought to the matter, it might well draw distinctions based upon the ground for denaturalization, the nature of the criminal convictions, and the time interval between naturalization and conviction, or between conviction and denaturalization.[18] But such differentiations are not for this Court to make.

Reversed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK concurs, dissenting.

It has not been contended, and the majority does not now hold, that there is a constitutional impediment to the deportation of an alien who is convicted of the commission of two crimes involving moral turpitude, regardless of his citizenship status at the time the crimes were committed. The question in this case is whether §§ 241 and 340 of the Immigration and Nationality Act of 1952 manifest a congressional intent to achieve such a result. I find the Court's decision inconsistent with the language of the statute, with its history and background, and with any reasonable purpose which can be ascribed to Congress in enacting it.

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[18] See Mr. Justice Frankfurter's dissenting opinion in *Eichenlaub* v. *Shaughnessy*, 338 U. S., at 533, 536–537.

I.

Petitioner, born in Italy, entered the United States as an alien in 1895, and in 1925 became a naturalized citizen of this country. In 1954 he was convicted on two separate counts of having attempted to defeat and evade the payment of income taxes by filing false and fraudulent returns for the years 1948 and 1949. The convictions were affirmed by this Court. *Costello* v. *United States,* 350 U. S. 359. In 1959 his certificate of naturalization was canceled on the ground that it had been procured by willful misrepresentation, and this judgment was also affirmed. *Costello* v. *United States,* 365 U. S. 265. The United States has now brought deportation proceedings under § 241 (a)(4) of the Immigration and Nationality Act of 1952, which provides that:

> "Any alien in the United States . . . shall . . . be deported . . . who at any time after entry is convicted of two crimes involving moral turpitude . . . ."

This description of the deportable alien fits Costello exactly and unambiguously. He is an alien now and was an alien at the time of entry, an alien who "at any time after entry is convicted of two crimes . . . ." The all-embracing language of the section recognizes no exception based upon the time the crimes were committed.

The qualification which the Court carves out of § 241 (a)(4), requiring that the convictions occur at a time when an alien is not a citizen, is not found in the statute itself and can be achieved only at the expense of the purpose of the statute which is clearly evident from its terms and history and which should control its construction if the Court is not to stray from its judicial function.[1]

[1] This Court has repeatedly stressed the principle that in construing statutes "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay

Pursuant to its power, unquestioned here, to prescribe the conditions for continued alien presence in this country, Congress has enacted § 241 (a) which embodies a determination that certain classes of aliens, by reason of their acts and conduct, are no longer desirable residents of this country. The significance of the provision in § 241 (a)(4) dealing with aliens who, any time after entry, commit two crimes involving moral turpitude is that in Congress' judgment the commission of two such crimes is indicative of a confirmed criminal type from whom the privilege of remaining in this country is to be withdrawn. The House Committee which recommended the predecessor to § 241 (a)(4) in § 19 of the Immigration Act of 1917 agreed unanimously that "those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should be deported." 53 Cong. Rec. 5168. It is not for us to reassess the wisdom of this congressional judgment, which was reaffirmed in the 1952 Act. The function of the dual conviction standard being to identify those individuals who are presumed to possess lawless propensities and who are therefore undesirable, the circumstance of nominal citizenship status at the time of conviction is beside the point.

In certain respects § 241 (a) redefined the criteria for deportability. Under subsection (d), § 241 was to be applied to an alien even though the conduct which placed him within a deportable class took place prior to the enactment of the section and even though that conduct would not have forfeited residential privileges under the previous law. This was the holding of the Court in *Lehmann* v. *Carson*, 353 U. S. 685, where an alien was

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down." *United States* v. *Whitridge*, 197 U. S. 135, 143. See *United States* v. *Shirey*, 359 U. S. 255, 260–261; *United States* v. *CIO*, 335 U. S. 106, 112; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543; *Ozawa* v. *United States*, 260 U. S. 178, 194.

held deportable under the 1952 Act for the prior commission of two crimes although under the former law a conditional pardon given for one of them would have saved the alien from deportation. Given *Lehmann* v. *Carson* and like cases upholding the power of Congress to legislate in this manner,[2] the legislative intention to provide current standards for deportability is not to be frustrated by importing irrelevant considerations such as the previous state of the law or the fact of technical citizenship at the time the crimes were committed. Neither bears upon the question of whether the alien's past conduct brings him within the present definition of the deportable alien.

Costello is an alien now, and his criminal propensities remain the same even though the crimes for which he has been convicted were committed while he was a nominal citizen. Nor is his present undesirability diminished by the fact that his citizenship upon which he relies was obtained by fraud and at a time when the law, as it has since 1917, provided for deportation upon the commission of two crimes involving moral turpitude.

Today's holding has an anomalous result. The alien who has not become a citizen is deportable for the commission of two crimes. But not so the alien who has committed two crimes and has also been denaturalized for fraud practiced in procuring his citizenship.[3] His fraud becomes his ready and effective shield, a result which I cannot believe Congress intended to enact into law.

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[2] *Marcello* v. *Bonds*, 349 U. S. 302; *Galvan* v. *Press*, 347 U. S. 522; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Mahler* v. *Eby*, 264 U. S. 32; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Bugajewitz* v. *Adams*, 228 U. S. 585.

[3] The Court points out that there may be cases in which this anomaly will not result. This observation does not alter the fact that it does exist in this case, and will exist in all cases where the revocation of the naturalization certificate is for fraudulent conduct.

II.

The foregoing interpretation of § 241 (a)(4) is fortified by an examination of the background against which it was enacted. The same issue that is presented by the instant case was resolved by this Court in 1950, a little over two years before the final passage of the 1952 Immigration and Nationality Act, in *Eichenlaub* v. *Shaughnessy* and its companion case *Willumeit* v. *Shaughnessy*, 338 U. S. 521. Eichenlaub and Willumeit were both born in Germany and entered this country in 1930 and 1925, respectively. In the 1930's they were naturalized, but their naturalization certificates were canceled for fraud in 1944. In 1941 and 1942, during the time they enjoyed citizenship status, they had been convicted of violations of the Espionage Act of 1917. The question was whether they were deportable under the Act of May 10, 1920, which declared deportable as undesirable residents:

> "All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation [of the Espionage Act, among others]."

As in the instant case Eichenlaub and Willumeit argued that deportability is conditioned on alienage status at the time of conviction.[4] This Court's answer to that contention was:

> "If the Act of 1920 had been intended to initiate the distinction here urged by the relators, it is likely that the change would have been made by express provision for it. We find nothing in its legislative

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[4] Dr. Willumeit contended that: "The language shows that the alien must be an 'alien' at the time that he 'may . . . be convicted.' The use of the words 'aliens who may *be*' convicted indicates that the alien must *'be'* an alien at the time of conviction. There is no other grammatical possibility." Brief for the Petitioner, *Willumeit* v. *Shaughnessy*, No. 82, October Term, 1949, p. 7.

history that suggests a congressional intent to distinguish between two such groups of undesirable criminals." 338 U. S., at 532.

Willumeit argued that since the Act of 1920 was occasioned by a desire to rid the country of two specific groups of enemy aliens not deportable under then existing statutes, it should be narrowly interpreted. The Court agreed as to the purpose of the Act but reached a different conclusion as to the principle of statutory interpretation which followed therefrom:

> "It is hardly conceivable that, under those circumstances, Congress, without expressly saying so, intended to prevent . . . [the deportation of] alien offenders merely because they had received their respective convictions at times when they held certificates of naturalization, later canceled for fraud. To do so would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it. Congress, in 1920, evidently wanted to provide a means by which to free the United States of residents who (1) had been or thereafter were convicted of certain offenses against the security of the United States, (2) had been or thereafter were found, after hearing, to be undesirable residents of the United States, and (3) being aliens were subject to deportation. Congress said just that." *Id.*, at 532–533.

The *Eichenlaub* case, decided at the time the 1952 Act was under consideration, carried the clear message that the courts would not impute to the legislature an intent to favor twice-convicted aliens whose citizenship has been canceled for fraud over those who never held citizenship status and that Congress must say so if it intended to create a distinction based on citizenship status at the time of conviction for crimes on which deportation proceedings

might be based. In the face of this message Congress proceeded to enact § 241 (a)(4) declaring that "Any alien . . . shall . . . be deported . . . who at any time after entry is convicted of two crimes involving moral turpitude." [5] Even if as a matter of abstract argument about the meaning of these words the majority's opinion is defensible, which I do not think it is, it fails completely as a matter of interpretation of this statute in the context of its enactment.

The petitioner contends that *Eichenlaub* is distinguishable on the ground that the statute in that case applied to aliens who "have been or may hereafter be" convicted, whereas § 241 (a)(4) refers to any alien who "is" convicted. His argument is that by use of dual verbs the statute in *Eichenlaub* explicitly referred to two groups of aliens, those who were and those who were not citizens when convicted. In his view, therefore, the decision in *Eichenlaub* must have rested upon the "have been" leg of the statute. But both the majority and the dissent in *Eichenlaub* recognized that the use of past and present verbs in the 1920 Act was necessary because that Act provided for two definite periods of time—between August 1,

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[5] The subcommittees of the House and Senate Judiciary Committees were aware of the *Eichenlaub* decision and of its bearing on § 241 (a)(4) of the pending statute. In answer to the objection that certain provisions of the proposed statute were *ex post facto* and therefore unconstitutional, Mr. Richard Arens, Staff Director of the Senate Subcommittee on S. 716 stated:

"What do you mean by ex post facto legislation? Does not the term 'ex post facto' by its historical origin and by the pronouncements of the Court in such cases as *Eichenlaub* v. *Shaughnessy* and these other cases, including the Eby case to which we alluded a few moments ago, establish beyond peradventure of doubt that that ex post facto has no applicability to an immigration procedure?"

Joint Hearings before the Subcommittees of the Committees on the Judiciary, Congress of the United States, 82d Cong., 1st Sess., on S. 716, H. R. 2379, and H. R. 2816, at 694.

1914, and May 10, 1920; and after 1920—in which the convictions might occur.[6] The coalescence of two verbs was thus unrelated to citizenship status at the time of conviction.[7]

III.

Whatever doubt as to congressional intent the majority may have after examining § 241 (a) standing alone should be dispelled by § 340 (a) of the Immigration and Nationality Act, which provides that revocation of a naturalization certificate relates back to, and is deemed

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[6] The opinion of the Court observed: "The statutory language which says that 'aliens who since August 1, 1914, *have been or may hereafter be convicted . . .*' refers to the requirement that the deportations be applicable to all persons who had been convicted of certain enumerated offenses since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920." 338 U. S., at 530.

And the dissent states: "The Act of May 10, 1920, provides that 'All aliens who since August 1, 1914, have been or may hereafter be convicted' of certain offenses shall be deported upon a finding that they are 'undesirable residents of the United States.' *Since neither of the petitioners herein was found to 'have been' convicted of any offense before passage of the Act, they come, it is urged, within the alternative prerequisite.*" 338 U. S., at 534. (Emphasis added.)

[7] Petitioner also argues that the absence of a "has been" provision in § 241 (a) (4) is significant because of the fact that most of the other grounds for deportation based on past conduct are stated in the alternative perfect and indicative verb forms: "is or has been," or "is or shall have been." In petitioner's view the reason for this distinction is that under the "is or has been" paragraphs, citizenship status at the time of the act or event is irrelevant, but the "is" language of paragraph (4) authorizes deportation only if alienage status and the basis for deportability coincide in time. This dichotomy of deportability tests would mean that a denaturalized alien could be deported for being convicted of carrying a sawed-off shotgun, or being connected with the management of a house of prostitution during the time he was a citizen, but not for two convictions of crimes involving moral turpitude. The absurdity of imputing to Congress the intent to achieve such a result is too obvious to require more.

"effective as of the original date of the order and certificate." [8] Under this section petitioner was not a citizen in 1954 because he did not become a citizen in 1924. It is therefore useless to talk about whether § 241 (a)(4) makes an exception for aliens who were citizens when convicted because § 340 makes clear that in Congress' view they were always aliens. The distinction which the Court reads into § 241 is a distinction which § 340 declares nonexistent.

The Court takes the position that the relation-back provision of § 340 (a) was intended to deal only with problems of derivative citizenship, having nothing to do with deportability. The argument is that prior to the passage of the Act the judicial doctrine of relation-back was so limited, and that there is no evidence that § 340 was intended to expand its coverage. I find both branches of the argument untenable.

Prior to 1952 *Rosenberg* v. *United States*, 60 F. 2d 475 (C. A. 3d Cir. 1932), and *Battaglino* v. *Marshall*, 172 F. 2d 979 (C. A. 2d Cir. 1949),[9] held that members of a de-

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[8] "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, *and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate . . . .*" (Emphasis added.)

[9] Revocation of fraudulently obtained naturalization certificates was authorized by statute in 1906; however, not until the 1952 Act was there an express statutory provision that revocations were to have retroactive effect. The judicial doctrine of relation-back developed in the interim. Although *Rosenberg* was the first case to apply the doctrine, dictum in this Court's decisions as early as 1912

naturalized alien's family derive through him no citizenship rights because "the certificate of naturalization was simply a paper fraud and conferred at the time of its grant no rights whatever . . . ." *Rosenberg* v. *United States,* 60 F. 2d, at 476. But the principle stated in those cases was by no means limited to problems of derivative citizenship, as is shown by the Second Circuit's decisions in *Eichenlaub* v. *Watkins,* 167 F. 2d 659 (C. A. 2d Cir. 1948), aff'd *sub nom. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, and *Willumeit* v. *Watkins,* 171 F. 2d 773 (C. A. 2d Cir. 1949), aff'd *sub nom. Eichenlaub* v. *Shaughnessy,* 338 U. S. 521. These two cases, which, as shown earlier, involved the same issue as the instant case, were decided by the Court of Appeals on the theory that "the decree of denaturalization relates back, at least for this purpose. Cf. Rosenberg v. United States, 3 Cir., 60 F. 2d 475." [10] On appeal the decisions were affirmed on other grounds, the Court finding it unnecessary to pass on the relation-back issue.

The development of the relation-back theory did not go unnoticed by Congress. Section 338 (d) of the Nationality Act of 1940 contained a provision saving derivative citizenship rights where the revocation was not occasioned by actual fraud. And in a report on its study of the Immigration and Nationality Laws published April 20, 1950, the Senate Judiciary Committee summarized then-existing law as follows:

> "The effect of a decree of denaturalization, as distinguished from expatriation or forfeiture of citizen-

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implied its existence. In *Johannessen* v. *United States,* 225 U. S. 227, 240–241, this Court cited with approval the following language from a lower court opinion: "It is [the applicant's] province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant." Cf. *Luria* v. *United States,* 231 U. S. 9, 24.

[10] *Eichenlaub* v. *Watkins,* 167 F. 2d 659, 660.

> ship, is to declare that the 'naturalized' person never was in fact naturalized, because either by fraud or illegality the statutory prerequisites were not met. The naturalization laws make certain reservations, saving the naturalization of children who derive citizenship from a parent from the alienage which they would otherwise incur because of the fraudulent or illegal naturalization." [11]

On the same day that the Senate Judiciary Committee published its report, the chairman of that Committee, Senator McCarran, introduced an omnibus bill, S. 3455, designed to incorporate all immigration and naturalization laws into one statute. That bill did not contain the general relation-back clause of the present § 340 (a). However, § 339 (f), substantially identical to § 340 (f) of the bill finally enacted, did provide for the consequences of denaturalization upon derivative rights. Had this bill been enacted, therefore, the legislative relation-back rule would have been limited to derivative citizenship matters, the problems of deportation being governed solely by the judicial doctrine, which was of course subject to change by the courts. However, Senator McCarran's next bill, S. 2055, introduced on August 27, 1951, contained not only a derivative citizenship relation-back clause (now § 340 (f)) such as had appeared in the earlier S. 3455, but also the general clause of § 340 (a).

The Government's theory as to the reason for this change is that since this Court's failure to pass on the relation-back rule in *Eichenlaub* cast doubt upon its continuing vitality as a judicial doctrine, Congress felt constrained to insure against the doctrine's being limited to derivative citizenship questions. While this is a reasonable suggestion it is neither expressly supported nor re-

[11] S. Rep. No. 1515, 81st Cong., 2d Sess., p. 755.

jected by the legislative history. This much, however, is clear: Prior to the passage of the 1952 Act four cases in the Courts of Appeals had applied the relation-back principle; two of these cases dealt with derivative citizenship rights and the other two with deportability. The 1952 Act not only dealt specifically with derivative citizenship but separately and expressly provided generally that denaturalization for concealment or willful misrepresentation was to be effective as of the date of the naturalization order. Congress thus provided its own relation-back doctrine and under it, unless it is to be rendered meaningless, Costello never legally became a citizen. He remained an alien and was an alien when he was convicted of the two crimes for which he has been ordered deported.

IV.

The majority finds support for its holding in supposed implications from the recommendation provision of § 241 (b). In the Court's view the recommendation provision was intended to apply to all cases in which an alien might be deportable under § 241 (a)(4); the unavailability of this provision to one who was not an alien at the time of the second conviction is therefore evidence that Congress did not intend such aliens to be deportable, it is asserted. The Court thus holds that the authority to deport under subsection (a)(4) is limited to those cases in which the deportee can invoke a recommendation against deportation.

My view of § 241 (b) is somewhat different. Congress defined in § 241 (a) the criteria for deportability and described those classes of aliens who were no longer qualified to stay in this country by reason of their past acts and conduct. But in the case of § 241 (a)(4) aliens, those convicted of crimes involving moral turpitude, Con-

gress did not make its own judgment final in every case. Although the alien might have been convicted of two such crimes and therefore would have fallen within the § 241 (a)(4) category, the sentencing judge was given the power to order that the alien not be deported. The Court's view is that deportability in every case must depend upon the opportunity to exercise the power given in § 241 (b), as well as upon its actual exercise to forbid deportation. But I think the Court misconceives the scope and intent of § 241 (b), which is not coextensive with § 241 (a)(4) and which has nothing to do with the coverage of the latter section.

Section 241 (a)(4) speaks in general terms and seems to apply to postentry convictions for any two crimes involving moral turpitude. But there are other paragraphs of § 241 (a) which specify particular crimes in themselves justifying deportation. Some of these crimes may not involve moral turpitude; others may, and therefore fall within the literal language of § 241 (a)(4). A recommendation against deportation of aliens convicted of these latter crimes is nonetheless ineffective, either because subsection (b) explicitly excludes the crime from its coverage, as in the case of narcotics offenses,[12] or because the offense is separately listed in a subsection

[12] Subsection (b) states:

"The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply . . . if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section." 8 U. S. C. § 1251 (b).

other than § 241(a)(4).[13] Obviously, therefore, Congress did not intend judicial review of deportability in every case where the commission of crime, whether involving moral turpitude or not, is the basis of the action.

Moreover, there are other situations within § 241(a)(4) where § 241 (b) procedures are unavailable and deportation nevertheless must follow. Under § 241 (a)(4) deportation may be based upon postentry convictions whether occurring in this country or abroad. The requirement of the prior law that postentry crimes be committed in this country was eliminated in the 1952 Act.[14]

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[13] See *Jew Ten* v. *Immigration and Naturalization Service*, 307 F. 2d 832 (C. A. 9th Cir.). Cf. *United States ex rel. De Luca* v. *O'Rourke*, 213 F. 2d 759 (C. A. 8th Cir.); *Ex parte Robles-Rubio*, 119 F. Supp. 610 (D. C. N. D. Cal.).

[14] Section 19 of the 1917 Act specified three categories of aliens deportable because of conviction for crimes involving moral turpitude. The classes of aliens involved were the following:

(1) "[A]ny alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States."

(2) "[Any alien] who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry."

(3) "[A]ny alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude."

Under the 1952 Act § 241 (a)(4) does not deal with deportation for crimes committed prior to entry, but the phrase "in this country," qualifying postentry convictions has been eliminated. As originally introduced by Senator McCarran, S. 2055 showed on its face that deportability for conviction of two crimes involving moral turpitude was not predicated on convictions obtained in this country. Section 241(a)(4) of that bill read:

"Any alien in the United States . . . shall . . . be deported who—

. . . . . .

"within five years after entry is convicted of a crime involving moral turpitude and either sentenced to confinement or confined therefor in

It seems obvious that § 241 (b) procedures would be unavailable in those cases where the crimes are committed abroad; yet it is difficult to believe that deportation is proscribed in those cases. This was the view of the Court of Appeals for the Third Circuit under the prior law where the provision for deportation for crimes committed abroad prior to entry [15] was ostensibly subject to the terms of § 241 (b)'s predecessor providing the same broad judicial veto.[16]

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a prison or corrective institution for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; or at any time after entry is convicted *in the United States* of any criminal offense, not comprehended within any of the foregoing, if the Attorney General in his discretion concludes that the alien is an undesirable resident of the United States." (Emphasis added.)

The clause authorizing deportation in the discretion of the Attorney General for conviction in the United States of any criminal offense was eliminated after a conference between Senators McCarran and Humphrey. 98 Cong. Rec. 5756, 5758.

[15] *Rasmussen* v. *Robinson*, 163 F. 2d 732, 734 (C. A. 3d Cir.), stated that:

"[T]his portion of the statute provides that the recommendation shall be made to the 'Attorney General'. The 'Attorney General' referred to is the Attorney General of the United States. The 'recommendation' is mandatory upon him. . . . It follows that the judges who are to make the recommendation are to be judges of courts of the United States or of the States for Congress certainly did not intend to impose the mandate of a foreign judiciary on the Attorney General of the United States. This means that crimes committed prior to entry, not within the United States, are not within the proviso, but crimes committed by an alien, in the United States, prior to entry, are within the proviso." Cf. *United States* v. *Hughes*, 116 F. 2d 613 (C. A. 3d Cir.).

[16] Section 19 of the 1917 Act provided:

"[T]he provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or

I think Costello's is another case in which Congress could not have intended the unavailability of § 241 (b) procedures to bar deportation. Under the Court's view no denaturalized alien can be deported for the commission of two or more crimes while a citizen. Congress intended no such result. It intended, as § 241 (b) expressly says, to bar deportation only when there was a judicial determination of nondeportability. There is none here. In Costello's case, and those like it, the judge has no opportunity to exercise his power under § 241 (b) because the convicted defendant, actually an alien under the law, appears before him with a certificate of citizenship, obtained by his own fraud, and prefers to continue the masquerade and to claim the protections of citizenship. In these circumstances, the lack of judicial consideration of Costello's deportability should not be equated to a judge's determination of nondeportability. This is especially true here since Costello knew of the denaturalization proceedings which had been instituted against him prior to his two convictions for tax fraud.[17]

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directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence . . . make a recommendation . . . that such alien shall not be deported."

[17] The petitioner and the majority suggest that if petitioner had been an alien at the time of his trial he could have offered to plead guilty to one count of income tax evasion in return for a *nolle prosequi* on the remaining counts, thereby avoiding the possibility of being convicted for two crimes. This is unrealistic for two reasons. At the time of the trial, denaturalization proceedings were pending against petitioner. *United States* v. *Costello,* 145 F. Supp. 892, reversed, 247 F. 2d 384 (C. A. 2d Cir.), reversed, 356 U. S. 256. He was therefore aware of the deportation implications flowing from conviction on dual counts, and was in a position to bargain as he felt most advantageous to himself. And even more speculative than the question of what the petitioner might have done had conditions been different is whether the Government, with denaturalization proceedings pending against Frank Costello, would have agreed to a *nolle prosequi* which would foreclose the possibility of later deportation proceedings.

Since I find no inconsistency between the language, background and purpose of § 241 (a)(4) on the one hand, and implications from § 241 (b) on the other, I regard the Court's reliance on *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, as misplaced. I have no quarrel with the doctrine that where the Court is unable to discern the intent of Congress, ambiguities should be resolved in favor of the deportee, but here there is a clear expression of congressional purpose. I would carry it out.

Syllabus.

GREENE *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 84. Argued November 21, 1963.—Decided February 17, 1964.

Following petitioner's successful challenge in *Greene* v. *McElroy*, 360 U. S. 474, of the revocation of his Government security clearance, he sought to recover for loss of earnings resulting from such revocation. Petitioner's claim was based in part upon a 1955 Department of Defense regulation providing for monetary restitution in cases where a "final determination" is favorable to a contractor employee. The Department took the position that petitioner did not qualify for monetary restitution under that regulation but offered to process his case under a 1960 regulation—issued while petitioner's claim was being processed—under which, before reimbursement would be allowed, an administrative determination had to be made that petitioner "would be" currently entitled to a security clearance. Petitioner neither required nor sought access authorization for classified information in his current employment. He then brought this action for restitution in the Court of Claims, but that court refused to pass on the merits pending petitioner's pursuit of his administrative remedies. *Held:*

1. Petitioner was entitled to compensation under the 1955 Department of Defense regulation. Pp. 160–162.

(a) Petitioner's rights matured under the 1955 regulation. P. 160.

(b) It would be unjustifiable to give the 1960 regulation retroactive effect, since that regulation had been issued after petitioner's claim had been asserted. P. 160.

(c) The District Court's order on remand voiding all determinations adverse to petitioner had the effect of reinstating petitioner's security clearance between the time of his discharge and the District Court's expungement order, which constituted a "final" and "favorable" determination within the meaning of the 1955 regulation. Pp. 160–161.

(d) Petitioner, having established the Government's improper denial of clearance by failure to provide fair procedures, can recover under the 1955 regulation "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance" without assuming the additional burden of showing at

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a later time, that if he had been afforded fair procedures he would have been able to demonstrate that he was entitled to access authorization to classified information. P. 161.

2. Since the right of petitioner to recover under the applicable regulation does not require a determination of his present eligibility, administrative remedies under the subsequent regulation, which would require such a determination, must be regarded as inappropriate and inadequate and therefore need not be exhausted. Pp. 162–164.

Reversed and remanded.

Eugene Gressman argued the cause for petitioner. With him on the briefs was *George Kaufmann.*

J. William Doolittle argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Louis F. Claiborne, Alan S. Rosenthal* and *Kathryn H. Baldwin.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioner, the prevailing party in *Greene* v. *McElroy,* 360 U. S. 474, comes to this Court for a second time. Prior to April 23, 1953, petitioner was employed by a private corporation producing mechanical and electrical parts for military agencies of the United States. On that date the corporation discharged him because of the revocation of his security clearance by the Department of the Navy. Following his challenge of this revocation, this Court held in 1959 in *Greene* v. *McElroy, supra,* that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Id.,* at 508. On remand the District Court, declaring that revocation of petitioner's security clearance was "not validly authorized," ordered that all rulings denying petitioner's security clearance be

"expunged from all records of the Government of the United States." [1]

In the interim between the security revocation and the District Court order, petitioner had found it necessary to take less remunerative nonsecurity employment.[2] When, after the prolonged litigation, he obtained judicial relief in 1959, his current employment did not require and he did not seek access authorization. He then sought only to recover compensation for the unauthorized govern-

[1] The text of the District Court order, dated December 14, 1959, is as follows:

"Upon the decision of the United States Supreme Court in this case (*Greene* v. *McElroy*, 360 U. S. 474) and the copy of the judgment and opinion of the Supreme Court heretofore filed with the clerk of this Court; and

"It appearing that counsel for the respective parties have consented hereto, it is hereby

"ORDERED that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized; and it is further

"ORDERED that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States."

[2] In the prior litigation this Court noted that the Court of Appeals had concluded:

"We have no doubt that Greene has in fact been injured. He was forced out of a job that paid him $18,000 per year. He has since been reduced, so far as this record shows, to working as an architectural draftsman at a salary of some $4,400 per year. Further, as an aeronautical engineer of considerable experience he says (without real contradiction) that he is effectively barred from pursuit of many aspects of his profession, given the current dependence of most phases of the aircraft industry on Defense Department contracts not only for production but for research and development work as well. . . . Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene." 360 U. S. 474, 491, n. 21, quoting 103 U. S. App. D. C. 87, 95–96, 254 F. 2d 944, 952–953.

mental action, and to that end, shortly after entry of the court order, formally requested the Department of Defense to provide monetary restitution for his loss of earnings. Petitioner based his claim on a 1955 Department of Defense regulation providing that where there has been "a final determination . . . favorable to a contractor employee," the employee will be reimbursed "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." [3] The Department of Defense refused to grant restitution under this 1955 regulation but offered to consider petitioner's claim under a 1960 regulation [4]

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[3] The pertinent regulation is Paragraph 26, Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, dated February 2, 1955:

"*Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this part."

[4] The July 28, 1960, regulation (Department of Defense Directive 5220.6, 25 Fed. Reg. 7523), issued pursuant to an Executive Order of February 20, 1960 (Exec. Order No. 10865, 25 Fed. Reg. 1583), contains the following provision for "monetary restitution":

"If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have

issued after the claim had arisen and had been formally asserted. Pursuant to the terms of the new regulation, the Department indicated that, as a condition of monetary restitution, it would be necessary to have an administrative determination that he "would be" currently entitled to a security clearance. Petitioner thereupon instituted the present action in the Court of Claims to obtain restitution under the terms of the 1955 regulation and the Fifth Amendment to the Constitution of the United States. The Court of Claims refused to pass on the merits of petitioner's claim and, applying the doctrine of exhaustion of administrative remedies, ordered proceedings "suspended pending pursuit of administrative remedies [made available] by the Department of Defense." [5] For the reasons stated below, we hold that petitioner is entitled to restitution under the 1955 regulation and that, under the circumstances, it was error to remit petitioner to further administrative proceedings under the 1960 regulation.

I.

The facts comprising the background of the present action are fully set forth in *Greene* v. *McElroy, supra,* at 476–491, and need only brief restatement here. Petitioner, an aeronautical engineer, was serving as vice president and general manager of Engineering and Research Corporation (ERCO), a private firm producing mechani-

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earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings."

[5] The order declared that: "In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States,* No. 47–60, and *Novera Herbert Spector* v. *The United States,* No. 48–60, further proceedings herein are hereby suspended pending pursuit of administrative remedies [made available] by the Department of Defense." The cases cited are now pending in this Court on petition for a writ of certiorari, No. 85, this Term.

cal and electrical parts for various agencies of the United States Armed Services. Petitioner had been employed by ERCO in 1937 and, except for a brief leave of absence, had continued with the firm. In connection with this employment, which involved classified work for the Armed Forces, he had obtained security clearances.[6] Indeed, before the revocation of his security clearance, the Industrial Employment Review Board, on January 29, 1952, had reversed the action of an inferior board and granted petitioner clearance for secret governmental contract work.

On April 17, 1953, however, the Secretary of the Navy notified ERCO that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security."[7] No hearing preceded this notification. The Secretary further requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and so, a week later, on April 23, 1953, petitioner was discharged. Petitioner promptly asked the Navy for reconsideration. A year later he was given a "hearing" in which he was denied an opportunity to confront or cross-examine the allegedly adverse witnesses. On the basis of this proceeding the appropriate administrative boards approved the Secretary's revocation of security clearance.

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[6] See *Greene* v. *McElroy*, *supra*, at 476, n. 1: "Petitioner was given a Confidential clearance by the Army on August 9, 1949, a Top Secret clearance by the Assistant Chief of Staff G–2, Military District of Washington on November 9, 1949, and a Top Secret clearance by the Air Materiel Command on February 3, 1950."

[7] At the time the Secretary acted, the administrative boards that had reviewed petitioner's earlier clearance had been abolished. See *Greene* v. *McElroy*, *supra*, at 480–483.

Petitioner thereupon filed a complaint in the United States District Court for the District of Columbia asking for appropriate injunctive relief and a declaration that the revocation was unlawful and void. The District Court denied relief, 150 F. Supp. 958, and the Court of Appeals affirmed, 103 U. S. App. D. C. 87, 254 F. 2d 944. Then, as noted above, on June 29, 1959, this Court, reversing the decisions below, held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy, supra,* at 508. On remand, the District Court on December 14, 1959, with the consent of the Government, entered a final order declaring: (1) "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was . . . not validly authorized," and (2) "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States." [8]

Following issuance of this order, petitioner initiated the administrative and legal steps immediately leading to the present action. His current employment did not require and he did not seek an opportunity to obtain current access authorization for classified information; indeed, he plainly says that he does not now "need or want" such authorization. His sole objective is to obtain compensation for the governmental action held by this Court not to have been validly authorized. On December 28, 1959, he made a formal demand of the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of

[8] The full text of the order is set forth in note 1, *supra.*

Defense pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553." This regulation, issued in 1955, provides as follows:

> "In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." [9]

The General Counsel of the Department of the Navy acknowledged the demand and requested that certain dates and financial data be supplied. A statement of petitioner's legal position respecting the applicability of the regulation was also requested. On April 20, 1960, he supplied the General Counsel of the Department of the Navy with the requested information and statement of legal position.[10]

While petitioner's claim was thus being processed, the Secretary of Defense on July 28, 1960, issued a new Industrial Personnel Access Authorization Review Regulation, a regulation superseding in pertinent part the 1955 regulation under which petitioner had claimed compensation.[11] The language of the new "monetary restitution" provision clearly indicates that the 1955 regulation had been significantly and substantially altered. Thus, instead of simply providing, as the earlier regulation did, that upon "a final determination . . . favorable to a contractor employee" the Government shall provide compensation for the loss of earnings, the 1960 regulation, *inter alia,*

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[9] See note 3, *supra.*

[10] Petitioner stated that he had incurred a $49,960.41 loss of earnings from April 23, 1953, the date of his dismissal, to December 31, 1959.

[11] The text of the new provision is set forth in note 4, *supra.*

(1) subjects the claimant's recovery to administrative discretion; (2) requires that "at a later time" the claimant qualify to receive a security clearance equivalent to that originally held or sought; (3) requires that the "favorable determination" be a favorable "administrative" determination; and (4) requires that the contrary determination had been "unjustified."

On January 4, 1961, petitioner was advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination. Petitioner then, in a letter addressed to the Director, reiterated his claim and stated that he was entitled to restitution under the 1955 regulation. After further communication, the Director advised petitioner that the Department of Defense was prepared to consider his case under the newly issued 1960 regulation and "to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information." On March 2, 1961, petitioner again submitted a statement of his legal position concerning the applicability of the 1955 regulation and again pointed out that he had no occasion to require and, therefore, was not seeking current security clearance. He expressly declined to request consideration of his case under the 1960 regulation. The Director responded by reemphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation."

Finally, on June 1, 1961, nearly a year and a half after this Court's decision and petitioner's request for compensation, the Deputy General Counsel of the Department of Navy advised petitioner that "[i]n accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions" of

the 1955 regulation. This conclusion was coupled with another expression of the Defense Department's willingness "to undertake the processing of his case under the July 28, 1960 Review Regulation . . . ."

Petitioner then commenced the present action in the Court of Claims, alleging that he was entitled to monetary restitution "in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment." Petitioner based his claim on the 1955 regulation and the Just Compensation Clause of the Fifth Amendment to the Constitution. The Government moved "to suspend proceedings in this case pending plaintiff's pursuit and completion of the administrative remedy available to him in the Department of Defense." Petitioner responded reasserting that the "July 28, 1960 Review Regulation has no application to [this] claim for monetary restitution . . ."; that his current employment did not require and that he did not seek or desire access authorization; and, therefore, that he was "not bound to exhaust any remedies under the July 28, 1960 Review Regulation before making such claim or bringing this suit." The Commissioner of the Court of Claims sustained the Government's position by ordering "further proceedings . . . suspended pending pursuit of administrative remedies [made available] by the Department of Defense." [12] The Court of Claims subsequently denied petitioner's request for review, and this Court granted certiorari, 372 U. S. 974.

II.

Petitioner contends that his right to monetary restitution must be determined under the 1955 regulation. This

[12] The text of the order is set forth in note 5, *supra*.

regulation provides that governmental liability follows from "a final determination . . . favorable to a contractor employee." Petitioner concludes that this Court's decision in *Greene* v. *McElroy, supra,* and the District Court order constitute the only final and favorable determination required by the 1955 regulation. He maintains that the judicial order expunging adverse determinations reinstated in effect the security clearance of January 1952—"at least for the period between petitioner's discharge on April 23, 1953, and the expungement order of December 14, 1959." Furthermore, petitioner argues, when in *Greene* v. *McElroy* this Court held unauthorized the revocation of security clearance, an act that deprived petitioner of his job, he became entitled as a matter of right to recover damages resulting from the loss of that employment.

The Government responds that the 1960, rather than the 1955, regulation applies and that, pursuant to the 1960 regulation, petitioner must establish as a condition of recovery that he now "would be" currently entitled to a security clearance. Alternatively,[13] assuming the 1955 regulation governs, the Government contends that before restitution is allowed there must be "a further showing, at the administrative level, that the challenged revocation of access authorization was not only procedurally incorrect, but substantively wrong." Specifically, the Government states, to meet the requirements of the 1955 regulation, petitioner "must at least show that he was entitled to clearance during the period for which he claims damages by reason of the denial of clearance." Finally, the Government argues, even if the 1955 regulation is applicable, petitioner must exhaust the possi-

[13] Although petitioner asserts that the Government in this Court in effect concedes that the 1955 regulation must govern, we understand the Government to have framed alternative arguments rather than to have made such a concession.

bility of recovery in administrative proceedings under the 1960 regulation.

Whatever petitioner's rights are, there can be no doubt they matured and were asserted under the 1955 directive. Not until six months after petitioner formally presented his claim to the Department of Defense did the Secretary of Defense issue a new, and substantially revised, regulation concerning "monetary restitution." Thus the Government's argument necessarily requires that the 1960 regulation be given retroactive application. As the Court said in *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199, "the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " [14] Since regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies and under the circumstances, it would be unjustifiable to give the 1960 regulation retroactive effect.

Our interpretation of the 1955 regulation makes it clear that petitioner has obtained the requisite final, favorable determination. In *Greene* v. *McElroy, supra,* this Court held that the Government had acted without authority in denying petitioner security clearance without providing the traditional safeguards of confrontation and cross-examination. On remand, and with the consent of the Government, the District Court entered the order voiding and expunging all determinations adverse to petitioner. As a result of the judicial action and in the absence of intervening administrative proceedings, the only legally

[14] See, *e. g., Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141, 164; Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775–781 (1936).

cognizable administrative determination—for the period between petitioner's 1953 discharge and the 1959 expungement order—was the January 1952 ruling granting petitioner security clearance. Thus the final judicial order effectively reinstated the last valid administrative determination, a determination which had been substantively favorable to petitioner. By virtue of the District Court order, therefore, petitioner must be regarded as having obtained, for the period between the discharge and the judicial mandate, a "final" and "favorable" determination.

Furthermore, we read the applicable regulation as equitably designed [15] to compensate employees whose security clearance has been improperly or wrongly denied. The directive's language does not reasonably warrant the implication that a claimant, who has sustained the burden of demonstrating that the Government acted without authority in revoking his clearance without fair procedures, must take on the additional burden of showing at a later time that if he had been afforded fair procedures in the first instance he would have been able to demonstrate successfully that he was entitled to access authorization. On the contrary, the regulation should be interpreted to mean that where a claimant establishes that the Government has improperly denied clearance by its failure to provide fair procedures, the Government is liable and petitioner is entitled to recover "in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance." [16]

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[15] The purpose of insuring "equity and justice" is reflected by the testimony in Hearings before the Subcommittee on Department of Defense Appropriations of the House Committee on Appropriations, 84th Cong., 1st Sess., pp. 774–781.

[16] The "interim resulting" would, we believe, in this case extend from petitioner's discharge in 1953 to issuance of the District Court order expunging the revocation of security clearance.

In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the Government action—reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge. This principle is analogous to that reflected in state court decisions recognizing that "a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis . . . ." See authorities cited in *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 365, n. 18.

Having determined that petitioner was entitled to compensation under the 1955 regulation, we must consider whether it was proper, as the Government contends here and the Court of Claims held, to remit petitioner to further administrative proceedings under the 1960 regulation.

The Department of Defense, after considering petitioner's claim for nearly a year and a half following this Court's decision in *Greene* v. *McElroy*, *supra*, specifically determined that "Mr. Greene does not qualify for monetary restitution under the provisions" of the 1955 regulation. Petitioner's legitimate claim thus having been presented and rejected, there can be no doubt that he had exhausted the reasonable possibility of administrative proceedings under the applicable regulation. The Government argues in effect, however, that the claim could be administratively processed, and petitioner possibly could recover, under the 1960 regulation and that, by failing to resort to proceedings under the newly issued regula-

tion, petitioner thereby failed to exhaust all available administrative remedies.

The Department of Defense had clearly declared that in the course of applying the 1960 regulation, it would necessarily "process the question of Mr. Greene's current eligibility for access authorization . . . ." As we have indicated, however, petitioner, who had to find non-security employment as a result of the 1953 clearance revocation, does not now require and is not seeking current access authorization. Therefore, an administrative review of his present eligibility is wholly irrelevant to a determination of his damages under the 1955 regulation. In view of the substantial differences between the two regulations and in view of the additional factual determinations that would be relevant under the 1960 regulation but irrelevant under the 1955 regulation, we conclude the 1960 regulation does not provide a reasonable basis for reviewing petitioner's rights under the 1955 regulation. We do not suggest that a claimant, seeking damages under a former regulation, need not resort to administrative proceedings under a new regulation where the new regulation contains essentially the same substantive requirements as its predecessor. Since in this case the only available administrative procedure entailed the burden of presenting the claim under an inapplicable and substantially revised [17] regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued.[18] It follows that petitioner, having exhausted administrative proceedings under the applicable 1955

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[17] See *supra*, pp. 156–157.

[18] See, *e. g.*, *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562–563; *Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587, 591; *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 625–626; 3 Davis, Administrative Law Treatise (1958), § 20.07; Jaffe, The Exhaustion of Administrative Remedies, 12 Buff. L. Rev. 327, 329–331 (1963).

regulation, properly resorted to the Court of Claims which Congress has invested with jurisdiction to entertain claims asserted against the United States and founded upon "any regulation of an executive department." 28 U. S. C. § 1491.

In summary, then, we hold that petitioner was entitled as a matter of right to compensation under the 1955 regulation [19] and that, when the Department of Defense rejected his claim under that regulation, he was not required to proceed administratively under the newly issued 1960 regulation. In so holding, we do not suggest that if petitioner were now seeking access to security-classified information, he would be entitled to have his clearance qualifications judged by other than current regulations. But all he seeks are damages for the Government's unauthorized action and to this much, we hold, he is certainly entitled.

Accordingly, the judgment of the Court of Claims is reversed and the case remanded to that court for a determination of the amount of restitution due petitioner.

Reversed and remanded.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

Once unraveled, this case presents a single simple issue, the answer to which is in my opinion very clear.

Whatever the Government's position earlier, it has now conceded that the petitioner's claim arises under and is to be settled in accordance with the 1955 regulation. In particular, the Government's brief states that "in light of the fact that petitioner's claim was initially filed under the 1955 regulation," the Department of Defense would

[19] Since we remand the cause to the Court of Claims to fix the amount of compensation, we need not and do not pass on petitioner's claim under the Just Compensation Clause of the Fifth Amendment.

not require him to show that the revocation of his clearance was substantively unjustified when ordered. Brief, page 14.

All that is left in this case, therefore, is a question concerning the proper construction of the 1955 regulation, which authorizes monetary restitution only "in cases where a final determination is favorable to a contractor employee . . . ." Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, 1559. The Government's position is that the quoted language conditions restitution on "a restoration of eligibility for access to classified information." Combined with the disclaimer above, this evidently means that the Government does intend to insist that petitioner show his present eligibility for clearance but not that he show his eligibility at the time clearance was revoked. The petitioner contends that this Court's decision in 1959, 360 U. S. 474, invalidating the revocation of his clearance for procedural defects, constitutes the favorable "final determination" required under the 1955 regulation.

It is evident that most of the Court's opinion has nothing to do with this issue. There is no reason to consider whether the petitioner could properly be remitted "to further administrative proceedings under the 1960 regulation" (*ante*, p. 153), or whether the 1960 regulation provides "a reasonable basis for reviewing petitioner's rights under the 1955 regulation" (*ante*, p. 163). Nor is it necessary to consider what the Department of Defense would require were it applying the 1960 regulation. Finally, the propriety of requiring the petitioner to show his acceptability for clearance in 1953 is not in issue, since no one is seeking to impose that requirement.

On the relevant issue, both of the Court's distinct explanations for its conclusion are unsatisfying. The first explanation is that the order of the District Court which expunged all adverse determinations left the peti-

tioner's prior clearance as "the only legally cognizable administrative determination" (*ante*, pp. 160–161). Therefore, the Court concludes, the District Court's order "must" be regarded as a "final" and "favorable" determination. But the conclusion is hardly compelled by the premises. Quite obviously, the order of neither this Court nor the District Court constituted a security clearance, which one would have thought to be the kind of final, favorable determination contemplated by the regulation.[1] There is certainly no inevitable logic which compels one to regard an order wiping out previously unfavorable rulings and leaving temporarily intact an initial favorable ruling as a *final* favorable determination; with at least equal logic, the situation could be regarded as one in which there has been no final determination.

The other explanation offered by the Court is even less satisfactory. The fact that the petitioner is not interested in present clearance does not *ipso facto* make his present eligibility "wholly irrelevant to a determination of his damages under the 1955 regulation" (*ante*, p. 163). The question is what the 1955 regulation requires, and the petitioner's needs and desires have little relevance to that question, if indeed they have any relevance at all.

The nub of this case is that the 1955 regulation almost certainly was not framed with the present situation in mind. The difficulties of applying a regulation meant to apply to situations involving a limited number of procedural steps to an administrative action taken in 1953 which evoked an unfavorable judicial response in 1959 and has led to further administrative and judicial pro-

[1] As was pointed out in my opinion concurring in the 1959 decision, there was "nothing in the Court's opinion which suggests that petitioner must be given access to classified material." 360 U. S., at 510.

ceedings still not terminated in 1964, have not unnaturally led both sides to take positions which are not clearly justified by the regulation. It may well be that the Department of Defense should, and perhaps could, not reasonably apply the requirement of present eligibility, sensible and certainly contemplated in the ordinary situation, to this case, where the present is so far removed from the relevant past and where current eligibility is no longer an issue. On the other hand, it is by no means obvious that a procedural default in the revocation of clearance automatically entitles the petitioner to restitution. The Government's liability depends on the infliction of actual harm and not simply on the commission of an error of law.[2]

The controlling point in the present posture of these proceedings is that the petitioner has not brought himself under the governing regulation as it is now construed by the department charged with its application. Well-accepted rules governing judicial review of administrative decisions require that the courts not intervene at this stage.[3] See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*,

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[2] *Silver* v. *New York Stock Exchange*, 373 U. S. 341, cited, *ante*, p. 162, but apparently not relied on by the Court, is, of course, far afield. That case decided that the Stock Exchange had committed acts which were violative of the antitrust laws and which were not insulated from illegality by the Securities Exchange Act. The plaintiff was suing a private defendant under the antitrust laws to recover actual damages.

[3] Since the majority holds that the petitioner was entitled to present his claim in the Court of Claims and that the claim is valid, it would be inappropriate for me to consider whether under my view of the case the proper course would have been direct dismissal for want of jurisdiction; an answer to that question would require a consideration of the petitioner's constitutional claims, not reached by the majority. See 28 U. S. C. § 1491.

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331 U. S. 752, 767–768.[4] It may be that if the petitioner followed the administrative path still open to him, he would be found entitled to all that he demands under the department's construction of the regulation. Or it may be that in the context of actual proceedings the department would modify its interpretation of the regulation. This might obviate the need for an interpretation by this Court and would in any event give assurance that those most concerned and informed about the regulation had been afforded an opportunity to adjust the various interests involved in this case.

The Court's short-circuiting of controlling principles is needless and unwise. I would remit the petitioner to his administrative remedy.

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[4] Professor Davis states that "probably every court requires exhaustion [of administrative remedies] when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief." 3 Administrative Law 56–57. Those conditions are met in this case.

Syllabus.

TILTON ET AL. *v.* MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 49. Argued January 7, 1964.—Decided February 17, 1964.

Petitioners were employees of respondent railroad who had been provisionally "upgraded" (advanced) from helpers to journeymen in accordance with an agreement between their union and the railroad, under which permanent seniority status as journeymen could be achieved following completion of a prescribed work period in the upgraded position. Petitioners' completion of the work period was delayed by their absence in military service, resulting in previously junior nonveterans completing the work period before petitioners and thereby attaining status senior to that of petitioners. Seeking restoration of seniority rights under Section 9 of the Universal Military Training and Service Act, petitioners brought this action in the District Court, which denied relief, and the Court of Appeals affirmed on the ground that petitioners' promotions were subject to contingencies and "variables" which precluded their advancement in status under the Act. *Held:*

1. Under § 9 (c) (1) and the "escalator principle" embodied in § 9 (c) (2) of the Act, petitioners upon completion of the work period were entitled to seniority as of the earlier date on which they would have completed the work period but for their absence in military service. *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, followed. Pp. 175–177.

2. Petitioners' advancement, unlike that involved in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, did not depend upon the exercise of management discretion, but was reasonably automatic and foreseeable. Pp. 180–181.

306 F. 2d 870, reversed and remanded.

Philip B. Heymann argued the cause for petitioners. On the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman.*

Robert W. Yost argued the cause and filed a brief for respondent.

George S. Parish filed a brief for the Veterans of Foreign Wars National Rehabilitation Service, as *amicus curiae*, urging reversal.

Clarence M. Mulholland, Edward J. Hickey, Jr. and *Richard R. Lyman* filed a brief for the Railway Employes' Department, AFL–CIO, as *amicus curiae*, urging affirmance.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Since 1940 Congress, as an integral part of selective service legislation, has protected the reemployment rights of veterans.[1] The principle underlying this legislation is

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[1] Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U. S. C. App. § 459, provides in relevant part as follows:

. . . . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . . . . .

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the

that he who is "called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284. Petitioners, reemployed veterans, sued respondent railroad, their employer, in the District Court for the Eastern District of Missouri.[2] They claimed that they have been deprived of seniority rights to which they are entitled under the Universal Military Training and Service Act and the applicable collective bargaining agreement.

The District Court[3] held that petitioners were not entitled to the relief they sought. The Court of Appeals

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nearest approximation thereof consistent with the circumstances in his case,

"unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

. . . . .

"(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

[2] Petitioners were represented by the United States Attorney, pursuant to the provisions of 50 U. S. C. App. § 459 (d). The Railway Employes' Department, AFL–CIO, has filed in this Court a brief *amicus curiae* opposing petitioners' claims.

[3] The opinion of the District Court is not reported.

for the Eighth Circuit affirmed. 306 F. 2d 870. We granted certiorari, 372 U. S. 905, because of the importance of the question in administering the statute protecting veterans' reemployment rights. For the reasons stated below, we reverse the judgments of the Court of Appeals.

The facts are not in dispute. Petitioners were initially employed by respondent railroad as carmen helpers. At the time of their original employment and since, the railroad has suffered from a shortage of qualified journeymen carmen mechanics. The collective bargaining agreement between the union representing the carmen, the Brotherhood Railway Carmen of America, and the railroad has provided methods for alleviating this shortage.[4] Whenever the railroad is unable to employ persons presently qualified as carmen mechanics, the agreement provides for the advancement or "upgrading" of carmen helpers to provisional carman status. Representatives of the railroad and the union jointly select the helpers to be so advanced. A helper thus "upgraded" can then be employed by the railroad to perform the work of a journeyman carman mechanic and is entitled to be paid a carman mechanic's wage.

Under the labor agreement, however, the "upgraded" helper does not immediately acquire permanent seniority

[4] The agreement provides in pertinent part:

"A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper."

as a journeyman. He retains his seniority as a helper until completing 1,040 days of actual work as a carman mechanic. At the end of that time the upgraded helper is considered a "qualified carman." He may then acquire a seniority date as a journeyman by making an election to that effect in writing.

Petitioners were upgraded from carmen helpers in accordance with the terms of the agreement. They were subsequently inducted into military service. At the time of his induction, Tilton had worked 145 days as a carman, Beck 851 days, and McClearn 21 days. Upon his honorable discharge from military service, each petitioner promptly returned to employment at the railroad, was reemployed as an upgraded carman, and thereafter satisfactorily completed the remainder of the 1,040-day work period necessary to qualify for journeyman status. Each, thereupon, immediately elected to acquire seniority as a journeyman carman mechanic. In each case, the railroad established petitioners' seniority as journeymen as of the date each actually completed the 1,040-day work period. As a result, petitioners had journeyman seniority junior to that of some carmen who had been upgraded to provisional carman status after petitioners were so advanced but who—because they were not absent in military service—were able to complete the 1,040-day service requirement before petitioners.

These nonveterans are now ahead of petitioners on the journeymen carmen's seniority roster and enjoy the advantages which seniority dictates, such as work preference and order of layoff and recall.

Petitioners contend that under this arrangement their absence in military service improperly affected their seniority because nonveteran employees who were junior on the temporary upgraded list are now senior on the permanent carmen's list.

Petitioners' claim rests upon §§ 9 (c)(1) and 9 (c)(2) of the Universal Military Training and Service Act. In § 9 (c)(1) Congress directed that veterans returning from military service be restored to their civilian employment "without loss of seniority." This provision was first enacted as part of the National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858. The Chairman of the House Military Affairs Committee in reporting the conference and final version of the bill explained that one of the purposes of the reemployment provisions was to ensure restoration of the veteran to his "seniority status." 86 Cong. Rec. 10761. The reemployment provisions, including what is now § 9 (c)(1), were carried over into the Selective Service Bill, 86 Cong. Rec. 10922–10923, and became § 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U. S. C. App. (1946 ed.) § 308.

In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, the Court first considered and specifically interpreted the language in § 8 (c) of the 1940 Act[5] dealing with restoration to veterans of their civilian employment "without loss of seniority." The Court said: "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence." *Id.*, at 288. The Court observed:

> "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Id.*, at 284–285.

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[5] The present § 9 (c)(1) is a reenactment of § 9 (c)(1) of the Selective Service Act of 1948, 62 Stat. 604, 614, as amended, 50 U. S. C. App. § 459, which had reenacted § 8 (c) of the Selective Training and Service Act of 1940.

This "escalator principle" was reaffirmed by the Court in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, and restated in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, 283:

> "[A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."

Following these decisions Congress, in 1948, expressly approved the "escalator principle" and continuous employment standard applied by the Court by adopting § 9 (c)(2) of the present Act which provides:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 62 Stat. 604, 615–616, as amended, 50 U. S. C. App. § 459 (c)(2).

Section 9 (c)(2), in effect, confirms the Court's interpretation of the meaning of § 8 (c) of the 1940 Act which is identical with § 9 (c)(1) of the present Act. *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, 271.

It was in light of this background that the Court decided *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960, which

petitioners contend, and which we agree, controls the present case. *Diehl* involved facts and issues virtually identical with those now before us. Diehl, like petitioners, was a railroad carman helper temporarily "upgraded" to carman status. He was inducted into military service while holding this upgraded position and, upon his return was restored to it. The collective bargaining agreement between the railroad and the union provided that upgraded carmen who had completed 1,160 days of work in that capacity could elect journeymen carman status. Upgraded men junior to Diehl had completed the requisite work period while he was in service and had been given seniority ahead of Diehl. Upon completion of the training period, Diehl protested claiming, as petitioners do here, that under §§ 9 (c)(1) and 9 (c)(2) of the Act, he was entitled to seniority as of the earlier date on which he would have completed the work period but for his absence in military service. The United States Court of Appeals for the Third Circuit decided against the veteran, on the ground that the Act protects only rights which are a mere function of time in grade and does not entitle the veteran to be treated as if he had been actively employed or trained during the period of military service. This Court reversed, *per curiam*, holding that "[u]pon the facts disclosed in the opinion of the Court of Appeals for the Third Circuit, 211 F. 2d 95, the applicable Acts of Congress, and the opinion of this Court in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, the judgment of the Court of Appeals is reversed." *Diehl* v. *Lehigh Valley R. Co.*, 348 U. S. 960.

Although it would be difficult to conceive of a more applicable and controlling precedent, the court below attempted to distinguish *Diehl* on the ground that there it had been stipulated that the claimant "would have

completed" the work period on a given date if there had been no military service interruption.[6] 306 F. 2d, at 877. "These stipulated words," the court said, "imply that the work completion was not dependent upon prior resolution of any contingency or uncertainty." *Ibid.* This case, unlike *Diehl* the court declared, "lacks the essentials of the automatic in the entire system of promotion from carman helper to full-fledged carman." *Ibid.* This distinction, in our view, is untenable.

There is no room for doubt in this case that "on the moving escalator of terms and conditions affecting [this] particular employment," *Oakley* v. *Louisville & Nashville R. Co.* 338 U. S. 278, 283, had petitioners remained continuously on the job during the period of their military service, they would have completed the work period and qualified as journeymen in advance of those who passed them in seniority during their absence. Each petitioner was entitled, under the labor agreement, to do carman's work ahead of any upgraded after him. It was only because of petitioners' military service that men upgraded after them were able to work more days as provisional carmen and to qualify as journeymen before them. But for their absence, petitioners would have qualified as journeymen carmen and achieved the seniority dates they now claim. This was confirmed by the testimony of the railroad's Chief Personnel Officer, Mr. Smith, who in effect conceded that the railroad under the collective bargaining agreement had no discretion to refuse journeyman's

[6] It is not absolutely clear that there was such a stipulation in *Diehl.* The Court of Appeals in *Tilton* said: "The parties in their briefs here both refer to a stipulation in Diehl. We find no clear reference to a stipulation in the opinions of either the Third Circuit or the district court. Inasmuch, however, as the plaintiffs' present counsel argued the Diehl case in the Supreme Court, we assume the existence of the stipulation." 306 F. 2d, at 877, n. 8.

status to a helper who had successfully completed the work period:

> "Q. Now, you have testified that these men, when they completed their three years or thousand and forty days of work, did not automatically acquire carman seniority. As soon as they made an election, the railroad had no choice but to give them the seniority, did it?
>
> . . . . . .
>
> "A. [Mr. Smith] That's right.
>
> "Q. In other words, as soon as they completed the work requirement, made the election as of that time, they became carmen and drew a seniority date?
>
> "A. [Mr. Smith] Correct."

It is evident, therefore, that promotion upon completion of the training period was as automatic here as in *Diehl*.

The Court of Appeals, alternatively, refused to follow *Diehl* on the assumption that it was overruled *sub silentio* by the subsequent decision of this Court in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265. The court below interpreted *McKinney* to hold that for a veteran to be entitled to an advancement in status, "the promotion in question [must] be automatic and . . . seemingly . . . automatic as a matter of foresight rather than of hindsight." 306 F. 2d, at 876. The court concluded that advancement to journeyman carman status in the instant cases did not meet that standard because it was subject to certain contingencies or "variables": lay-offs due to illness or reduction in force; the continuing unavailability of enough qualified carmen to fill carmen's positions; continuing satisfactory work by petitioners in the upgraded position; and petitioners' decisions as to whether or not to elect full carman status.

306 F. 2d, at 877.[7] Accordingly, the Court of Appeals held the eventual acquisition by petitioners of journeyman carman status could not have been foreseen with absolute certainty at the time they entered military service and that, under *McKinney,* they were therefore not entitled to seniority status as of the date they would probably have achieved it but for their military service.

In this reading of *McKinney,* the Court of Appeals erred. *McKinney* was not intended to and did not overrule *Diehl.* Nor did *McKinney* establish a requirement of absolute foreseeability. That case did not involve the *Diehl*-type situation where advancement depends essentially upon continuing employment. It turned upon the fact that the collective bargaining agreement there in issue made the exercise of management discretion a prerequisite to promotion. The Court concluded, therefore, that the advancement was not basically dependent upon continued employment. This is clear from the Court's statement that:

> "Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1 (3) (A) of the collective bargaining agreement it is dependent on fitness and ability and the exercise of a discriminating managerial choice. . . . The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion." 357 U. S., at 272.

Furthermore, the Court's mandate in *McKinney* supports the view that the Court did not adopt a rule of absolute foreseeability. In remanding the case, the Court granted McKinney leave to amend his complaint to allege, if such was the fact, that in practice under the

[7] These contingencies were present in *Diehl* but did not bar relief.

collective bargaining agreement "advancement from group 2 to group 1 is automatic." 357 U. S., at 274. If the Court had intended to adopt a rule of absolute foreseeability of automatic advancement, it would not have permitted McKinney to amend his complaint. It was apparent that McKinney, when he left for service, could not have predicted with absolute certainty that a group 1 position would fall vacant in his absence; that he would be in adequate health to bid for it; that he would elect to bid for it; and that he would not have lost his lower position because of unsatisfactory performance. Properly read, therefore, *McKinney* holds that where advancement depends on an employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service.[8]

It would be virtually impossible for a veteran to show, as the Court of Appeals would require, that it was absolutely certain, "as a matter of foresight" when he entered military service, that all circumstances essential to obtaining an advancement in status would later occur. To exact such certainty as a condition for insuring a veteran's seniority rights would render these statutorily protected rights without real meaning. As Benjamin Franklin observed, "In this world nothing is certain but death and taxes." In every veteran seniority case the possibility exists that work of the particular type might not have been available; that the veteran would not have worked satisfactorily during the period of his absence; that he might not have elected to accept the higher posi-

[8] The only discretion in the present case was that vested in the railroad and union to select from among the carmen helpers those to be upgraded. This discretion had been exercised in petitioners' favor prior to their entry into military service.

tion; or that sickness might have prevented him from continuing his employment. In light of the purpose and history of this statute, however, we cannot assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights. "This legislation," the Court said in *Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* at 285, "is to be liberally construed for the benefit of those who left private life to serve their country . . . ." So construed, we conclude that Congress intended a reemployed veteran, who, upon returning from military service, satisfactorily completes his interrupted training, to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur.

This does not mean that under §§ 9 (c)(1) and 9 (c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service. Any lesser protection, would deny him the benefit of the salutary provisions of §§ 9 (c)(1) and 9 (c)(2) of the Universal Military Training and Service Act. The judgments of the Court of Appeals are reversed and the cause remanded for proceedings in conformity with this opinion.

Reversed and remanded.

720-509 O-65—16

BROOKS *v.* MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 53. Argued January 7–8, 1964.—Decided February 17, 1964.

The apprenticeship program of petitioner, an apprentice machinist employed by respondent railroad, was delayed by his military service, and because of a layoff he ultimately completed that program at a location different from where he began it. In a proceeding by petitioner to establish his seniority as journeyman under § 9 of the Universal Military Training and Service Act, the District Court directed the railroad to grant him seniority status at the place where he completed his apprenticeship and as of the time he would have completed it but for his military service. The Court of Appeals reversed on the ground that petitioner's advancement lacked "predictable certainty." *Held:* Petitioner's otherwise automatic advancement from apprentice to journeyman did not lack reasonable foreseeability so as to defeat his claim for seniority under § 9 of the Act because of the possibility that "the balance between the supply and demand" of labor at a certain point and date would have prevented such advancement. *Tilton* v. *Missouri Pac. R. Co.*, *ante*, at p. 169, followed. Pp. 183–185.

308 F. 2d 531, reversed and remanded.

Philip B. Heymann argued the cause for petitioner. On the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman.*

Robert V. Light argued the cause for respondent. With him on the brief were *Herschel H. Friday* and *W. J. Smith.*

Clarence M. Mulholland, Edward J. Hickey, Jr. and *Richard R. Lyman* filed a brief for the Railway Employes' Department, AFL–CIO, as *amicus curiae,* urging affirmance.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case differs only slightly from *Tilton* v. *Missouri Pac. R. Co.* decided today. *Ante*, at 169. Petitioner here was hired by the railroad on July 5, 1951, to serve as an apprentice machinist in Monroe, Louisiana. After completing seven months of apprenticeship, he was drafted into military service. He was honorably discharged on November 7, 1953, and immediately returned to work as an apprentice in Monroe. On April 29, 1954, petitioner was laid off because of the termination of the apprenticeship program at Monroe. On July 6, 1954, he resumed his apprenticeship with the railroad in St. Louis, Missouri. On July 25, 1955, at his request and with the railroad's approval, petitioner was transferred to the railroad's shops in North Little Rock, Arkansas, where he completed his apprenticeship on January 23, 1958. He was immediately employed at the North Little Rock shops as a journeyman machinist and assigned a seniority rating as of that date and location.

Petitioner sought a North Little Rock seniority date of November 3, 1955. He claimed that but for his military service, he would have completed his apprenticeship on that date and at that location. The railroad offered him that seniority date, but only at the Monroe location. Petitioner declined this offer on the ground that there were no employment opportunities at that location.

Petitioner brought suit in the District Court for the Eastern District of Arkansas. The court found,* on the basis of adequate evidence, that "in practice . . . discretion had no play . . . . [T]ransition from the rank of apprentice to the rank of mechanic was automatic." It also found that "in no event would plaintiff have com-

*The opinion of the District Court is not reported.

pleted his apprenticeship at Monroe." But for his military service he "would have completed [his training] in 1955 . . . and . . . as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics." Accordingly, the District Court directed the railroad to grant him seniority as of November 3, 1955, at North Little Rock.

The Court of Appeals for the Eighth Circuit reversed, 308 F. 2d 531, on the basis of its earlier decision in *Tilton* v. *Missouri Pac. R. Co.*, 306 F. 2d 870. The court held that the advancement from apprentice to journeyman lacked the predictable certainty required by the *Tilton* decision, because "[t]he balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty." 308 F. 2d, at 533. We granted certiorari, 372 U. S. 904.

We reverse the judgment of the Court of Appeals for the reasons stated in *Tilton, ante,* at 169. As we said in that case:

> "In every veteran seniority case the possibility exists that work of the particular type might not have been available; that the veteran would not have worked satisfactorily during the period of his absence; that he might not have elected to accept the higher position; or that sickness might have prevented him from continuing his employment. In light of the purpose and history of this statute, however, we cannot assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights." *Ante,* at 180–181.

We think that the foregoing analysis is dispositive of the problem here. The possibility that the "balance between supply and demand" would have prevented petitioner's otherwise automatic promotion should not defeat his seniority claim. This possibility, like the possibilities discussed in *Tilton*, always exists.

We accept the conclusion of the District Court that but for petitioner's military service, he probably would have achieved, by virtue of continued satisfactory employment, seniority status as a journeyman mechanic in North Little Rock on November 3, 1955. It follows, therefore, that he is entitled to this status under the relevant statutes. The judgment of the Court of Appeals is reversed and the cause remanded for proceedings in conformity with this opinion.

Reversed and remanded.

METROMEDIA, INC., ET AL. *v.* CITY OF PASADENA ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 659. Decided February 17, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 216 Cal. App. 2d 270, 30 Cal. Rptr. 731.

Charles Seligson, William French Smith and *Paul E. Iverson* for appellants.

Charles S. Rhyne for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC., *v.* KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 665. Decided February 17, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 369 S. W. 2d 9.

James E. Thornberry for appellant.

Robert Matthews, Attorney General of Kentucky, and *Robert L. Montague III* and *Holland N. McTyeire*, Assistant Attorneys General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BROOKS *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 681. Decided February 17, 1964.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

James W. Kynes, Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for appellee.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PERSINGER *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 745, Misc. Decided February 17, 1964.

Appeal dismissed and certiorari denied.
Reported below: 62 Wash. 2d 362, 382 P. 2d 497.

Appellant *pro se.*

James E. Kennedy for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

ROGERS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 412, Misc. Decided February 17, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 313 F. 2d 425.

John D. Spellman for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon consideration of the entire record, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit to reconsider the conviction on count nine in light of the Government's confession of error and to determine whether the judgment of the District Court should be affirmed on the basis of the conviction under count seven.

KOTEK *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 908, Misc. Decided February 17, 1964.

Appeal dismissed and certiorari denied.
Reported below: 255 Iowa 984, 124 N. W. 2d 710.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

CITY OF NEW ORLEANS ET AL. *v.* BARTHE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 663. Decided February 17, 1964.

Appeal dismissed; certiorari granted; and judgment affirmed.
Reported below: 219 F. Supp. 788.

Alvin J. Liska for appellants.

Jack Greenberg, James M. Nabrit III, Ernest N. Morial and *A. P. Tureaud* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, before judgment,* pursuant to 28 U. S. C. § 1254 (1), to the United States Court of Appeals for the Fifth Circuit, the petition is granted. The judgment of the United States District Court for the Eastern District of Louisiana is affirmed. *Turner* v. *City of Memphis,* 369 U. S. 350; *Watson* v. *City of Memphis,* 373 U. S. 526.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that this case is not appealable to this Court under 28 U. S. C. § 1253 but is appealable to the Court of Appeals under 28 U. S. C. § 1291, and that this Court should dismiss the appeal for the Court of Appeals to consider and decide the appeal of this case now properly pending before it. See *Bailey* v. *Patterson,* 369 U. S. 31.

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*See *Griffin* v. *Prince Edward County Bd.,* 375 U. S. 391, and cases cited.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* WEBB'S CITY, INC.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT.

No. 362. Decided February 17, 1964.

Motion to advance denied; judgment vacated; and cause remanded. Reported below: 152 So. 2d 179.

Robert L. Carter, Fred G. Minnis and *Richard Feder* for petitioners.

D. M. Patrick for respondent.

PER CURIAM.

Petitioners' motion to advance is denied. On respondent's suggestion of mootness, the judgment of the District Court of Appeals of Florida, Second District, is vacated and the cause remanded to that court for appropriate proceedings to effectuate respondent's representation that the injunction below will be set aside, without prejudice to the right of petitioner to move to vacate today's order in the event the injunction is not promptly vacated by the trial court.

COX *v.* KANSAS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 453, Misc. Decided February 17, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 191 Kan. 326, 456, 380 P. 2d 316, 381 P. 2d 704.

Petitioner *pro se*.

William M. Ferguson, Attorney General of Kansas, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Kansas for further consideration in light of *Douglas* v. *California*, 372 U. S. 353, and *Daegele* v. *Kansas*, 375 U. S. 1.

UNITED STATES *v.* MERZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 65. Argued January 13–14, 1964.—
Decided February 24, 1964.*

Under Rule 71A (h) of the Federal Rules of Civil Procedure, Commissions were appointed by district courts to determine the issue of just compensation in eminent domain proceedings. Following hearings, reports were filed by the Commissioners, which the District Court adopted in each instance, though the reports did not disclose the basis on which the awards were reached. One Court of Appeals affirmed, finding the awards well within the range of conflicting testimony despite a sharp evidentiary conflict as to the amount of damages. The other Court of Appeals remanded for resubmission to the Commissioners since the reports did not indicate which evidence they credited; the degree to which the awards were based on the testimony of comparable sales (or whether the sales were, in fact, comparable); nor to what extent the awards depended on opinions of nonexpert witnesses. *Held:*

1. The basis of ultimate findings of value in an eminent domain proceeding must be clearly disclosed in the report of a commission appointed under Rule 71A (h), conclusory findings alone being insufficient for proper judicial review. Pp. 193–200.

2. Where a commission is appointed under Rule 71A (h), careful procedures must be observed to ensure that it acts as a deliberative body applying constitutional standards. Pp. 197–200.

(a) The District Court should carefully instruct the commissioners on the law, qualifications of expert witnesses, evidence, the manner and method of conducting the hearing, and the kind of report to be filed. Pp. 198–199.

(b) The parties should state their objections to the instructions and to the report in timely and specific form. P. 199.

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*Together with No. 79, *2,872.88 Acres of Land et al.* v. *United States*, on certiorari to the United States Court of Appeals for the Fifth Circuit, argued January 14, 1964.

(c) The District Court may then adopt the report, modify it on the basis of the record, reject it in whole or in part, receive further evidence, or recommit it with instructions, all as provided in Rule 53 (e)(2). Pp. 199–200.

306 F. 2d 39, reversed; 310 F. 2d 775, modified and remanded.

Roger P. Marquis argued the cause for the United States in No. 65. With him on the brief were *Solicitor General Cox* and *Raymond N. Zagone.*

Denver W. Meacham argued the cause for respondents in No. 65. With him on the brief was *William J. Holloway, Jr.*

Forrest L. Champion, Jr. argued the cause for petitioners in No. 79. With him on the briefs were *W. Lowrey Stone, Lowrey S. Stone* and *Jesse G. Bowles.*

Harold S. Harrison argued the cause for the United States in No. 79. On the brief were *Solicitor General Cox, Roger P. Marquis* and *Hugh Nugent.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present questions concerning the standards governing the preparation and review of reports of commissions appointed by district courts under Rule 71A (h) of the Federal Rules of Civil Procedure [1] to determine the

[1] Rule 71A (h) provides:

"(h) Trial.

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property

issue of just compensation [2] in eminent domain proceedings. Some of the property interests taken are fee interests and some are flowage easements, road easements, and clearance easements.

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to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

Rule 53 provides in relevant part:

"(e) Report.

. . . . .

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

As to the history of Rule 71A (h) see 7 Moore, Federal Practice (2d ed. 1955), pp. 2709–2712; Nealy, Rule 71A (h) in Federal Condemnation Proceedings, 23 Fed. Bar Jour. 45 (1963); H. R. Rep. No. 739, 82d Cong., 1st Sess.; S. Rep. No. 502, 82d Cong., 1st Sess.; S. Rep. No. 112, 83d Cong., 1st Sess.; Preliminary Draft of Proposed Rule to Govern Condemnation Cases, Advisory Committee on Rules for Civil Procedure, June 1947.

For the Rule in operation see Annual Report, Judicial Conference of the United States, 1961, pp. 17, 106, 254; Annual Report, Judicial Conference of the United States, 1962, pp. 30, 212–214; H. R. Rep. No. 1467, 86th Cong., 2d Sess., p. 11.

[2] No question is presented concerning the right to jury trial notwithstanding Rule 71A (h). While the Government asked for a jury trial in both cases, the question was not preserved nor brought here.

In No. 79 the District Court instructed the Commissioners on the standards of "just compensation," the factors that could be considered in determining it, the weight to be given the opinion of competent experts, the burden of proof, the conduct of the hearing to be held, and the propriety of viewing the lands in question. And they were instructed to file a written report "setting forth separately your findings of fact and conclusions of law and the amount of just compensation to which you think each property owner or claimant is entitled."

In No. 65 the District Court gave no instructions to the Commissioners, so far as the record shows.

The hearing in each case was transcribed by a reporter. In each, both the landowners and the Government produced witnesses. In No. 65 the effect of clearance easements on agricultural uses and on mineral values was contested. In No. 79 the testimony was widely at variance on the value of the fees. Severance damages were also hotly contested. The value of improvements was also at issue as respects one property.

In No. 65 the Commission filed a report in which it listed each tract, following which it added a dollar figure for "Damages Assessed." The Government objected to the adequacy of the report, as a result of which a supplemental one was filed which described in greater detail the clearance easements taken and stated that the highest and best use of the land was for general agricultural purposes. The supplemental report added that: (1) the United States was entitled to take the property and the landowners were entitled to just compensation; (2) just compensation was to be determined by subtracting the value of the landowners' interests immediately after the taking from their value immediately before the taking; (3) the use to which the Government would put the area taken by the clearance easements was not an issue in the case; and (4) certain evidence pertaining to

a tract taken in fee simple was stricken, and the Government's motion to strike the testimony of one witness for the landowners was overruled.

In No. 79 three reports, one covering each landowner, were filed. Each report contained capsule résumés of all testimony heard, and, as findings of fact, set forth a description of the interests taken, the lands' highest and best use, the acreage remaining after the taking and the amount of severance damage to it, the value of the fees taken and of each easement, and the total awards. Each report also stated that the United States had the right to take the land and that the landowners were entitled to just compensation, including severance damages. One report stated that a government objection to certain evidence had been overruled. The first report, in addition to placing a lump sum value on the fee interest taken, allowed no severance damage for the "home place," four miles away, and yet granted $15,785 severance damages to other portions of the remaining tract without explication and in spite of the fact that the landowner's expert fixed severance damages, apart from the "home place," at $12,435. In the second report the landowner's expert witness valued the entire tract at $52,500, the land taken at $36,125, and improvements at $12,700. The Government's experts did not value improvements separately but assessed the fee interest taken at $34,000. The Commission, without any findings concerning improvements, awarded $52,950—a sum in excess of the valuation placed on the full 400 acres by the landowner's expert—as compensation for taking about 330 acres. And it awarded $3,500 for severance damages though the highest estimate was $1,275. The third report valued lands at $105,080 while the landowner's own expert valued them at $93,693. The Commission also awarded severance damages without any indication as to the basis for them.

In both No. 65 and No. 79, the District Courts adopted the Commissions' reports, setting forth no additional or supplementary grounds of decision nor taking further evidence to resolve any of the objections tendered by the Government. In No. 65 the Court of Appeals affirmed, stating that, although there was a sharp conflict in the evidence as to the amount of the damages, the awards were well within the range of the conflicting testimony. 306 F. 2d 39, 42. In No. 79 the Court of Appeals remanded for resubmission to the Commissioners, saying that the reports did not indicate which evidence the Commission credited and which it discredited, the degree to which the awards were based on the testimony of comparable sales, whether the sales were in fact comparable, and to what extent the awards depended on the opinions of nonexpert witnesses. 310 F. 2d 775, 777, 779. The cases are here on writs of certiorari. 372 U. S. 974, 975.

The use of a commission to resolve the issue of just compensation is justified by the facility with which commissioners may inspect the property and a likelihood that uniformity of awards may be realized expeditiously. At the same time, there is danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards. A jury, until it retires, sits under the direct supervision of the judge, who rules on the admissibility of evidence, who sees that witnesses are properly qualified as experts, and who polices the entire hearing, keeping it within bounds. Then in due course the judge instructs the jury on the law, answering any inquiries its members may have on the law. The jury is under surveillance from start to finish and subject to judicial control. Hence its general verdict that the land is worth so many dollars is not overturned for lack of particularized findings.

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The judge who uses commissioners, however, establishes a tribunal that may become free-wheeling, taking the law from itself, unless subject to close supervision. The first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. That was done in one of the present cases. But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it.

The commissioners should also be instructed as to the kind of report to be filed. Since by Rule 71A (h) the report has the effect of a master's findings of fact under Rule 53 (e)(2), the commission should be instructed as to what kind of findings should be included. Conclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court "unless clearly erroneous"; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. See *United States* v. *Lewis*, 308 F. 2d 453, 458. The commissioners need not make detailed findings such as judges do who try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do

not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked. Such a requirement is within the competence of laymen; and laymen, like judges,[3] will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.[4]

Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific, rather than in generalized form, as required by equity practice. See *Sheffield & Birmingham R. Co.* v. *Gordon*, 151 U. S. 285, 290, 291.

If those procedures are followed and the District Court adopts the report, as it may under Rule 53 (e)(2), the Court of Appeals will have some guidelines to help it determine whether the report is "clearly erroneous" within the meaning of Rule 53 (e)(2). If the use of those guidelines by the District Court leaves it in doubt, there are alternatives. It may "modify" the report on the basis of the record made before the commissioners,

[3] See *Burlington Truck Lines, Inc.*, v. *United States*, 371 U. S. 156, 167–168; *United States* v. *Forness*, 125 F. 2d 928, 942–943; *United States* v. *Lewis*, 308 F. 2d 453, 456.

[4] The Hague Convention of October 18, 1907, by Article 79 provided that an arbitration award "must give the reasons on which it is based." Chief Justice Hughes—then Secretary of State—said in a case involving that provision: it "does not mean that the statement of reasons must be cast in any artificial form, much less that the reasons given should be those which the defeated party would recognize as adequate." The Secretary of State to President Harding, Jan. 11, 1923, II Foreign Relations of the United States, 1923, pp. 617, 620.

or it "may reject it in whole or in part or may receive further evidence or may recommit it with instructions"—all as provided in Rule 53 (e)(2). We think the District Court in each of these cases should have the opportunity under Rule 53 (e)(2) to make its decision afresh, in light of this opinion. We write on a clean slate against a background of a contrariety of views among the circuits. The reports in each of these cases leave much to be desired, measured by the standards we have suggested. None of the reports should have been adopted without more by the District Court. On remand, its informed discretion will be used to determine whether the matters should be resubmitted in whole or in part to the respective commissioners or whether, in light of the exigencies of the particular case, the court should itself resolve the disputes on the existing records,[5] or on those records as supplemented by further evidence.[6]

The judgment in No. 65 is reversed and the judgments in No. 79 are modified and each is remanded to the District Court for proceedings in conformity with this opinion.

It is so ordered.

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[5] See *United States* v. *44 Acres of Land*, 234 F. 2d 410, 414; *United States* v. *Twin City Power Co.*, 248 F. 2d 108, 112; *United States* v. *Certain Interests in Property*, 296 F. 2d 264, 268; *United States* v. *Carroll*, 304 F. 2d 300, 303–304.

[6] See *United States* v. *Carroll*, *supra*, 303–304.

DIAMOND *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 100. Argued February 20, 1964.—Decided February 24, 1964.

Certiorari dismissed as improvidently granted.

James M. Nabrit III argued the cause for petitioner. With him on the brief were *Jack Greenberg, Wiley A. Branton* and *Johnnie A. Jones.*

Ralph L. Roy argued the cause for respondent. With him on the brief was *Jack P. F. Gremillion,* Attorney General of Louisiana.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

NEILL ET AL. *v.* COOK ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 691. Decided February 24, 1964.

Appeal dismissed and certiorari denied.

A. B. Culbertson for appellants.

Joe A. Moss for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

DOUGHTY *v.* MAXWELL, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 422, Misc. Decided February 24, 1964.

Certiorari granted and judgment reversed.
Reported below: 175 Ohio St. 46, 191 N. E. 2d 727.

Petitioner *pro se*.

William B. Saxbe, Attorney General of Ohio, and *William C. Baird*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Carnley* v. *Cochran*, 369 U. S. 506, *Gideon* v. *Wainwright*, 372 U. S. 335.

WOLFSOHN, EXECUTRIX, *v.* HANKIN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 680. Decided February 24, 1964.

Certiorari granted and judgment reversed.

Reported below: 116 U. S. App. D. C. 127, 321 F. 2d 393.

Fred I. Simon for petitioner.

Gregory Hankin, pro se, and *John V. Long* for respondent Hankin.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U. S. 215; *Thompson* v. *Immigration and Naturalization Service*, 375 U. S. 384.

MR. JUSTICE CLARK, whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I have concluded that *Harris Truck Lines* v. *Cherry Meat Packers*, 371 U. S. 215 (1962), should be confined to its peculiar facts, *i. e.*, a finding of "excusable neglect" under Rule 73 (a) of the Federal Rules of Civil Procedure. I say this, although I joined *Harris*, because the Court has used *Harris* to spawn the present hopeless confusion which I never contemplated at the time of its decision. *Harris* was the authority upon which the Court rested *Thompson* v. *Immigration and Naturalization Service*, 375 U. S. 384 (1964), despite the fact that *Thompson* involved Rules 52 (b) and 59 (b) and (e) with their specific requirements that the motion must be made or served not later than 10 days after the

entry of judgment. The Court brushed aside these express and unambiguous mandates of Congress with the assertion that *Thompson* "fits squarely within the letter and spirit of *Harris*." 375 U. S. 384, 387. And now comes a third case, involving the same Rule 59 (b), which further compounds the subversion of the rules. It appears clear to me that through *Harris* this Court has given trial judges the *de facto* power to grant extensions of time, directly *contra* to the definite requirements of Rules 52 (b) and 59 and the command of Rule 6 (b) that the court "may not extend the time for taking any action under rules . . . 52 (b), 59 (b), (d) and (e) . . . ." I therefore respectfully dissent.

Syllabus.

FEDERAL POWER COMMISSION *v.* SOUTHERN CALIFORNIA EDISON CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 71. Argued January 14, 1964.—Decided March 2, 1964.*

Petitioner, a California municipality, purchased electric energy, part of which was from out-of-state, from respondent public utility company, using some for itself but reselling the bulk to others. The respondent Public Utilities Commission of California had previously exercised jurisdiction over the rates charged the city by the public utility company, but on the city's petition the petitioner Federal Power Commission (FPC) asserted jurisdiction under § 201 (b) of the Federal Power Act, which extends federal regulatory power to the "sale of electric energy at wholesale in interstate commerce." The Court of Appeals set aside the FPC order, however, in view of the declaration in § 201 (a) of the Act that federal regulation is to "extend only to those matters which are not subject to regulation by the States." Since the initial out-of-state sales, at Hoover and Davis Dams, to the public utility company were subject to regulation by the Secretary of the Interior and the energy subsequently sold was consumed wholly within California, the court concluded that the rates were subject to state regulation. *Held:*

1. The FPC's jurisdiction under § 201 (b) is plenary and extends to all wholesale sales of power in interstate commerce not expressly exempted by the Act itself. The scope of FPC's jurisdiction is not to be determined by a case-by-case analysis of the impact of state regulation upon the national interest, nor can the general policy declaration in § 201 (a) nullify the specific grant of jurisdiction in § 201 (b). Pp. 206–216.

2. All sales of energy generated at the Hoover Dam are not exempted from FPC regulation by virtue of § 6 of the Boulder Canyon Project Act granting the Secretary of the Interior "control of rates and service in the absence of State regulation or interstate agreement," that provision having been superseded by Part II of the Federal Power Act, which includes § 201 (b). Pp. 216–220.

310 F. 2d 784, reversed.

*Together with No. 73, *City of Colton* v. *Southern California Edison Co. et al.*, also on certiorari to the same court.

Ralph S. Spritzer argued the cause for petitioner in No. 71. With him on the briefs were *Solicitor General Cox, Frank Goodman, Richard A. Solomon, Howard E. Wahrenbrock, Thomas M. Debevoise* and *Peter H. Schiff.*

John W. Cragun argued the cause for petitioners in No. 73. With him on the brief were *Reuben Goldberg* and *Angelo A. Iadarola.*

Boris H. Lakusta and *John R. Bury* argued the cause for respondent Southern California Edison Co. With them on the brief were *Rollin E. Woodbury* and *Harry W. Sturges, Jr.* *Mary Moran Pajalich* argued the cause for respondent Public Utilities Commission of California. With her on the brief was *J. Thomason Phelps.*

Northcutt Ely and *C. Emerson Duncan II* filed a brief for the American Public Power Association, as *amicus curiae,* urging reversal.

Austin L. Roberts, Jr. filed a brief for the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner City of Colton, California (Colton), purchases its entire requirements of electric power from respondent Southern California Edison Company (Edison), a California electric utility company which operates in central and southern California and sells energy only to customers located there. Colton applies some of the power purchased to municipal uses, but resells the bulk of it to thousands of residential, commercial, and industrial customers in Colton and its environs. Respondent Public Utilities Commission of California (PUC) had for some years exercised jurisdiction over the Edison-Colton sale, but petitioner Federal Power Com-

mission (FPC), on Colton's petition filed in 1958, asserted jurisdiction [1] under § 201 (b) of the Federal Power Act which extends federal regulatory power to the "sale of electric energy at wholesale in interstate commerce." 49 Stat. 838, 847, 16 U. S. C. §§ 791a, 824–824h.[2] The

[1] Colton presently purchases its requirements from Edison under a 10-year contract made in 1945 which continues in effect from month to month after the end of the term until terminated by either party by written notice. The contract was filed with the PUC, and it was in 1958, after PUC approved a second increase in the contract rates, that Colton requested FPC to institute an investigation to determine if the Edison-Colton sale was subject to federal jurisdiction. An investigation was made and a hearing ordered. The staff of FPC, Colton, PUC and Edison participated in the hearings which followed. The staff of FPC and Colton supported FPC jurisdiction but Edison and PUC opposed. The Hearing Examiner ordered the dismissal of Colton's petition and the FPC reversed. Federal jurisdiction was found to have attached as of July 1, 1954. Edison was ordered to file the 1945 contract and to cease and desist from charging Colton in excess of the contract rates without FPC authorization. Edison was also required to account for sums in excess of those rates collected on and after July 1, 1954, and to establish a special reserve account for that excess with interest. 26 F. P. C. 223.

[2] Section 201 in pertinent part is as follows:

"(a) It is hereby declared that . . . Federal regulation of . . . the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to . . . the sale of electric energy at wholesale in interstate commerce . . . . The Commission shall have jurisdiction over all facilities for such . . . sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over . . . facilities used in local distribution . . . .

. . . . . .

"(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part."

Court of Appeals for the Ninth Circuit set aside the FPC order. 310 F. 2d 784.

Some of the energy which Edison markets in California originates in Nevada and Arizona. Edison has a contract with the Secretary of the Interior under which, as agent for the United States, it generates energy at the Hoover power plants located in Nevada. This contract allocates to Edison 7% of the total firm generating capacity of Hoover Dam.[3] Edison is also a party to a 1945 contract with the United States and the Metropolitan Water District of Southern California under which it is entitled to a portion of the unused firm energy allocated to the Water District from Hoover Dam. Payment for this energy is made to the United States for the credit of the Water District. Also, Hoover Dam, Davis Dam in Arizona, and Parker Dam in California are interconnected by a transmission line from which Edison has drawn energy by agreement with the Water District.

The FPC found, on the extensive record made before a Hearing Examiner, that out-of-state energy from Hoover Dam was included in the energy delivered by Edison to Colton, and ruled that the "sale to Colton is a sale of electric energy at wholesale in interstate commerce subject to Sections 201, 205 and 206 of the Federal Power Act." 26 F. P. C. 223, 231.[4]

The Court of Appeals did not pass upon the question whether the finding that out-of-state energy reached Col-

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[3] While Edison admits that it is a "public utility" within the meaning of § 201 (e) of the Federal Power Act by virtue of its ownership of two interstate transmission lines running from Hoover Dam to its Chino substation in California, its status as a public utility does not decide the question whether the FPC may assert jurisdiction over the rates of the Edison-Colton sale. Cf. *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U. S. 515.

[4] FPC regulation of rates rests on §§ 205 (a) and 206 (a), 16 U. S. C. §§ 824d, 824e.

ton has support in the record.[5] The court assumed that the finding had such support, but held nevertheless that § 201 (b) did not grant jurisdiction over the rates to the FPC. It ruled that the concluding words of § 201 (a)—"such Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the States"—confined FPC jurisdiction to those interstate wholesales constitutionally beyond the power of state regulation by force of the Commerce Clause, Art. I, § 8, of the Constitution. Accordingly, it held that the

[5] The briefs of PUC and Edison argue that the FPC's finding that some out-of-state energy is delivered by Edison to Colton is not supported by substantial evidence in the record. Among other findings, the FPC found: "On the basis of the record, electric energy generated at Hoover was sold to Colton during 596 hours out of 598 hours in the last six months of 1954, 1,338 hours out of 2,065 in 1955, 270 hours out of 1,954 in 1956, 199 hours out of 1,388 in 1957, and 1,115 hours out of 1,479 in 1958; and these deliveries included Davis energy during 341 hours in 1954, 746 hours in 1955 and 31 hours in 1956." 26 F. P. C., at 231. Of course, under the Act "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." § 313 (b). We have said of Part II of the Power Act that "federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic or governmental, test.*" *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, 324 U. S. 515, 529. (Emphasis supplied.) We have examined the proofs. They are in sharp conflict but we hold that the engineering and scientific evidence received by the Commission on the subject from the Commission's own experts afforded substantial evidence upon which to rest the findings which trace out-of-state energy to the City of Colton.

The PUC also argues that any out-of-state energy was *de minimis* in amount and that FPC jurisdiction did not attach on that account. But that fact would be relevant only on the question whether Edison was a "public utility" over which FPC in its discretion should assume jurisdiction, *Connecticut Light & Power Co.* v. *Federal Power Comm'n*, *supra*, pp. 535–536. Here Edison is concededly a "public utility" and we agree with the FPC that in that circumstance the FPC has "no discretion to reject that jurisdiction." 26 F. P. C., at 236.

FPC had no jurisdiction because PUC regulation of the Edison-Colton sale was permissible under the Commerce Clause. Because of the importance of the question in the administration of the Federal Power Act we granted the separate petitions for certiorari of the FPC and Colton. 372 U. S. 958. We reverse. We hold that § 201 (b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself,[6] and that the FPC properly asserted jurisdiction of the Edison-Colton sale.

The view of the Court of Appeals was that the limiting language of § 201 (a), read together with the jurisdictional grant in § 201 (b), meant that the FPC could not assert its jurisdiction over a sale which the Commerce Clause allowed a State to regulate. Such a determination of the permissibility of state regulation would require, the Court of Appeals said, an analysis of the impact

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[6] Section 201 (b) expressly excludes FPC jurisdiction "over facilities used in local distribution." Edison and PUC raise in their briefs the question whether federal jurisdiction over the sale of electric energy by Edison to Colton is prevented by the "local distribution" proviso of § 201 (b). Whether facilities are used in local distribution—although a limitation on FPC jurisdiction and a legal standard that must be given effect in addition to the technological transmission test, *Connecticut Light & Power Co.* v. *Federal Power Comm'n, supra,* p. 531—involves a question of fact to be decided by the FPC as an original matter. The FPC found in this case that "there are facilities owned by Edison which it uses exclusively to effect the wholesale to Colton and not for local distribution. These include the City of Colton substation and portions of the 12 kv. Globe mills and Derby lines after service to the last customer at retail. . . . The fact that the 12 kv. lines . . . serve an industrial customer, several lighted highway signs, a residence and a railroad section house before they reach the transformers in the Colton City Substation does not transform them into local distribution lines even if this were relevant." 26 F. P. C., at 232. The findings have ample support in the evidence and the conclusion may properly rest upon the specialized experience of the FPC in determining such questions.

of state regulation of the sale upon the national interest in commerce. The court held that such an analysis here compelled the conclusion that the FPC lacked jurisdiction, because state regulation of the Edison-Colton sale would not prejudice the interests of any other State. This conclusion was rested upon the view that the interests of Arizona and Nevada, the only States other than California which might claim to be concerned with the Edison-Colton sale, were already given federal protection by the Secretary of the Interior's control of the initial sales of Hoover and Davis energy. Since the first sale was subject to federal regulation, and since the energy subsequently sold by Edison to Colton for resale was to be consumed wholly within California, there was said to be a "complete lack of interest on the part of any other state," and the sale was therefore held to be subject to state regulation and exempt from FPC regulation. 310 F. 2d, at 789.

The Court of Appeals expressly rejected the argument that § 201 (b) incorporated a congressional decision against determining the FPC's jurisdiction by such a case-by-case analysis, and in favor of employing a more mechanical test which would bring under federal regulation all sales of electric energy in interstate commerce at wholesale except those specifically exempted, and would exclude all retail sales. In reviewing the court's ruling on this question we do not write on a clean slate. In decisions over the past quarter century we have held that Congress, in enacting the Federal Power Act and the Natural Gas Act, apportioned regulatory power between state and federal governments according to a test which this Court had developed in a series of cases under the Commerce Clause. The Natural Gas Act grew out of the same judicial history as did the part of the Federal Power Act with which we are here concerned; and § 201 (b) of the Power Act has its counterpart in § 1 (b)

of the Gas Act, 15 U. S. C. § 717 (b), which became law three years later in 1938.[7]

The test adopted by Congress was developed in a line of decisions beginning with *Public Utilities Comm'n* v. *Landon*, 249 U. S. 236, and *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23. In those cases this Court held that the Commerce Clause does not prohibit a State from regulating the sale of gas directly to consumers even though the gas be drawn from interstate mains. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309, sketched in the other side of the picture by holding that a State is prohibited from regulating the rate at which gas from out-of-state is sold to independent distributing companies for resale to local consumers. The last decision in this line, and the one which directly led to congressional intervention, was *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83. There the Public Utilities Commission of Rhode Island asserted jurisdiction over the rates at which a Rhode Island company sold energy generated at its Rhode Island plant to a Massachusetts company, which took delivery at the state line for resale to the City of Attleboro. The Court held that *Kansas Gas, supra*, controlled, that the case did not involve "a regulation of the rates charged to local consumers," and that since the sale was of concern to both Rhode Island and Massachusetts it was "national in character." Consequently, "if such regulation is required

[7] Section 1 (b) of the Natural Gas Act is:

"The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821 (1938), 15 U. S. C. § 717 (b).

it can only be attained by the exercise of the power vested in Congress." 273 U. S., at 89–90.

Congress undertook federal regulation through the Federal Power Act in 1935 and the Natural Gas Act in 1938. The premise was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated. *Attleboro,* with the other cases cited, figured prominently in the debates and congressional reports.[8] In *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U. S. 498, we

[8] See S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17–54 (1935); H. R. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7–8 (1935). The hearings before both the House and Senate Committees reflect the general consensus that under *Attleboro* and the earlier decisions, the Commerce Clause denied the States power over any wholesale transaction in interstate commerce. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., pp. 96, 384, 402, 421–422, 435, 497–498, 518, 521–523, 1612, 1614, 1622–1623, 1629, 1639, 1642, 1656–1657, 1679, 2143, 2144, 2156 (1935); Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 250–251, 760, 767, 768, 800–801 (1935). The general solicitor of the National Association of Railroad & Utilities Commissioners said during the House hearings: "That case [*Attleboro*] has been accepted by everybody as establishing . . . the fact that the State cannot regulate wholesale transactions, although it can regulate retail service and rate." Hearings on H. R. 5423, *supra,* p. 1657. At the Senate hearings he said: "The second part of the bill [§ 201 (b)] provides for regulation by the Federal Government of wholesale transactions in electric power. Those are transactions which the United States Supreme Court has held are beyond the reach of the States under the Constitution. The States have long regulated the rates charged by the local distributing companies to consumers; but they cannot reach the interstate producer supplying the distributing company." Hearings on S. 1725, *supra,* pp. 756–757. "It therefore follows that if there is to be any regulation of the wholesale part of the electric and gas business which passes over State lines it must be supplied by the Federal Government." *Id.,* p. 768.

were first required to determine the scope of the federal power which Congress had asserted to meet the problem revealed by *Attleboro* and the other cases. The specific question in that case was whether a company selling interstate gas at wholesale to distributors for resale in a single State could be required by that State's regulatory commission to extend its facilities and connect them with those of a local distributor, or whether such extensions were exclusively a matter for the FPC. The Court noted that prior to the Natural Gas Act there had been another line of cases which adopted a more flexible approach to state power under the Commerce Clause; these cases had been "less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and [have] looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." 314 U. S., at 505. But the Court held that Congress, rather than adopting this flexible approach, which was applied by the Court of Appeals in the instant case, "undertook to regulate . . . without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases." *Id.*, at 506–507. What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at "local retail rates to ultimate consumers." 314 U. S., at 504.

This conclusion has been consistently reaffirmed in subsequent cases. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, which considered the reach of § 1 (b) of the Natural Gas Act, the Court said that "the line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No ex-

ceptions were made in either category for particular uses, quantities or otherwise." 332 U. S., at 517. In *United States* v. *Public Utilities Comm'n of California,* 345 U. S. 295, the Court said that "Congress interpreted that case [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power," 345 U. S., at 308, and further that "Part II [of the Power Act] is a direct result of *Attleboro.* They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." 345 U. S., at 311.

Plainly, the Court of Appeals' reading of the § 201 (a) proviso as requiring an appraisal in each case of the impact of the particular sale, is inconsistent with these decisions. Section 201 (b) embodies a clear grant of power, and we have held that § 201 (a) was merely a "policy declaration . . . of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co.* v. *Federal Power Comm'n,* 324 U. S., at 527. We reiterated this view in *United States* v. *Public Utilities Comm'n, supra,* 345 U. S., at 311, where we also said, "to conceive of it [§ 201 (a)] now as a bench mark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support." In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making

unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. There is no such exception covering the Edison-Colton sale.[9]

The PUC and Edison would alternatively find a congressional exemption in the asserted fact that Congress has exempted from FPC regulation all sales of energy generated at Hoover Dam. Section 6 of the Boulder Canyon Project Act, 45 Stat. 1061, 43 U. S. C. § 617e, grants the Secretary of the Interior "control of rates and service in the absence of State regulation or interstate agreement" and provides that "he shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer." The FPC reversed the Hearing Examiner's ruling that § 6 was an exclusive grant to the Secretary of regulatory power over Hoover energy, and held that "what authority to regulate rates that is here granted to the Secretary of the Interior is authority that would be subject to the later enactment of the Federal Power Act in 1935 containing a comprehensive scheme for the regulation of sales at wholesale in interstate commerce (Section 201 (b))." 26 F. P. C., at 227. The Court of Appeals did not decide the question but assumed that it was properly determined in favor of FPC and Colton. 310 F. 2d, at 786, n. 2.

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[9] In 1954 Congress amended the jurisdictional provision of the Natural Gas Act to exempt persons receiving natural gas within a State and transmitting or selling it for consumption solely within the same State. 68 Stat. 36, 15 U. S. C. § 717 (c). A proposal which would have similarly limited FPC jurisdiction in the electric power field died in Committee. See Hearings before House Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 2972 and 2973, 80th Cong., 1st Sess.

We think that the reasoning underlying our decisions in *United States* v. *Public Utilities Comm'n, supra,* and *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n,* 343 U. S. 414, is directly applicable here, and requires a decision upholding FPC jurisdiction. Those cases involved the question whether FPC jurisdiction under § 201 (b) was precluded by a provision of the 1920 Water Power Act which is similar to § 6. The Water Power Act became Part I of the Federal Power Act when Part II was enacted in 1935. Section 20 provided that the rates and services in connection with sales of energy generated at hydroelectric projects licensed under that Act were to be regulated by the FPC whenever "any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State . . . or such States are unable to agree through their properly constituted authorities on the services . . . or on the rates . . . ." In *United States* v. *Public Utilities Comm'n, supra,* the PUC asserted jurisdiction over rates of a company licensed under Part I of the Federal Power Act. The FPC ordered the licensee to show cause why the rates were not subject to exclusive federal jurisdiction. The PUC argued that § 201 (b) was inapplicable, relying upon the concluding words of § 201 (a), and contending that since § 20 contained an affirmative grant of power to the States, FPC regulation was precluded. This Court held that there is no evidence that Congress intended to give the states what was essentially national power, for that question was not determined until *Attleboro,* and:

> "The sweep of the statute [201 (b)] is wholly inconsistent with any asserted state power as fixed by § 20 of the 1920 Act. We have examined the legislative history [of § 201 (b)]; its purport is quite clear. . . . There is nothing to indicate that Congress' conception of the states' disability in 1935, or

> of the power it gave the Commission by Part II, did not include Part I electricity. In fact, the unqualified statements concerning Part II favor the opposite construction, for we find the Act explained time and again as empowering the agency with rate authority over interstate wholesale sales for resale; not once is this authority spoken of as one conditioned on the electricity concerned having been produced by steam generators or at nonlicensed dams." 345 U. S., at 307–308.

In the *Pennsylvania Water* case the FPC asserted jurisdiction over the rates charged by a licensee to a Maryland distributor of electric power. In sustaining FPC jurisdiction we rejected the contention that because Pennsylvania Water was a licensee under Part I of the Federal Power Act, and therefore subject to regulation under that Part, its regulation under Part II was precluded. 343 U. S., at 418–419.

We think the power given the Secretary under § 6 of the Boulder Canyon Project Act is similar in scope to the power of the FPC under § 20 of the 1920 Water Power Act. Under the Water Power Act the principal function of the FPC, then composed of the Secretaries of War, Interior, and Agriculture, was the licensing, construction and operation of hydroelectric development projects. Its power to regulate rates was based upon the national power over navigable waters and public lands, and not upon power over interstate commerce. It was exercised only as an incident of the licensing power, and then only to fill a hiatus which might otherwise exist in the absence of state regulation. The legislation rests on the assumption that the FPC would regulate only in the absence of state regulation.

An analysis of § 6 of the Boulder Canyon Project Act compels the same conclusion. The parallel between

the two sections is unmistakable. Licensing by the FPC for the construction of Hoover Dam was unnecessary because Congress itself had authorized the construction. Since general supervisory power was given to the Secretary rather than the Commission, § 6 of the Act gave him powers analogous to those given the FPC by § 20 of the Water Power Act.[10] While the words of § 6 do not precisely track those of § 20, the history of § 6 belies the assertion that it contained an affirmative grant of power to the States. It merely assumed, contrary to *Attleboro,* a breadth of state regulatory power [11] which made unnecessary all but intersticial federal regulation. Although § 6 did not become law until two years after

[10] The Secretary of the Interior had then as he has now the duty to fix the rates at which he sells Hoover energy to enable the United States to recoup the costs of building the dam and associated facilities. Boulder Canyon Project Act, Dec. 21, 1928, c. 42, §§ 4 (b), 5, 45 Stat. 1057, 1059, 1060, 43 U. S. C. §§ 617c (b), 617d; Boulder Canyon Project Adjustment Act, July 19, 1940, c. 643, § 1, 54 Stat. 774, 43 U. S. C. § 618. Section 201 (f) of the Federal Power Act exempts the Secretary's sale of energy from FPC jurisdiction but our concern in this case is not with the Secretary's sales to Edison but with Edison's resale to Colton.

[11] As originally introduced, the bill contained no reference to the regulation of resales of Hoover energy. Compare H. R. 6251, 69th Cong., 1st Sess. (1925), with H. R. 5773, 70th Cong., 1st Sess. (1927). The Secretary of the Federal Power Commission presented his views in letter form to the Senate Committee on Irrigation, and warned that "there is no requirement that any Federal agency shall, in absence of State regulation or of interstate agreement, have any jurisdiction to regulate rates, services, or security issues of lessees, whether the power developed be or be not transmitted in interstate commerce." See Hearings before the Senate Committee on Irrigation and Reclamation on S. Res. No. 320, 69th Cong., 1st Sess., pt. 6, at 893 (1925).

The present form of § 6 is generally conceded to be the result of this letter, and it is thus apparent that, far from being an affirmative grant of power to the States, that section only referred to state power as a means of defining the contingency upon which federal power would be asserted.

Attleboro was decided, that section was in the legislation proposed two years earlier, and it does not appear from the legislative history of § 6 that the attention of Congress was ever directed to the significance of that decision upon the effectiveness of the section.[12]

On the other hand, the legislative history of Part II of the Power Act demonstrates that Congress believed that *Attleboro* and the related cases compelled it to forego its assumption as to state regulation and displace it with comprehensive federal regulation. A proper concern for this objective requires the conclusion that Part II superseded and repealed any regulation under § 6 by the Secretary of the Interior or the States of interstate wholesales of electric energy subsequently made of Hoover power.

The judgment of the Court of Appeals is

Reversed.

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[12] There is no merit in the argument that the failure of Congress expressly to repeal this portion of § 6 when passing the Boulder Canyon Project Adjustment Act in 1940, 54 Stat. 774, as amended, 43 U. S. C. §§ 618–618p, and the Act of May 28, 1954, c. 241, 68 Stat. 143, evinces a congressional intention that the Secretary and not the FPC regulate wholesale rates. The 1940 Act modified the method by which the Secretary was to fix the rates at which he sells Boulder Canyon energy but had no bearing upon the regulation of subsequent sales. See H. R. Rep. No. 2328, 76th Cong., 3d Sess. (1940).

KREZNAR ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 85. Decided March 2, 1964.

Certiorari granted and judgment reversed.

Sidney Dickstein, David I. Shapiro and *George Kaufmann* for petitioners.

Solicitor General Cox, Acting Assistant Attorney General Douglas and *Alan S. Rosenthal* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Greene* v. *United States, ante,* p. 149.

MR. JUSTICE HARLAN dissents for the reasons stated in his dissenting opinion in *Greene* v. *United States, ante,* p. 164.

LORD *v.* WINCHESTER STAR ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 732. Decided March 2, 1964.

Appeal dismissed and certiorari denied.

Reported below: 346 Mass. 764, 190 N. E. 2d 875.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

HONEYWOOD ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

No. 267. Decided March 2, 1964.

214 F. Supp. 897, affirmed.

Moses M. Falk for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Irving Galt,* Assistant Solicitor General, *Sheldon Raab,* Assistant Attorney General, and *Irving D. Goodstein* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *Wright* v. *Rockefeller, ante,* p. 52.

MARTIN, SECRETARY OF STATE OF TEXAS, ET AL. *v.* BUSH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 675. Decided March 2, 1964.

Judgment affirmed on authority of *Wesberry* v. *Sanders, ante,* p. 1, without prejudice to appellants' right to apply to District Court by April 1, 1964, for further equitable relief.

224 F. Supp. 499, affirmed.

Waggoner Carr, Attorney General of Texas, *Albert P. Jones* and *Hawthorne Phillips,* First Assistant Attorneys General, *Mary K. Wall,* Assistant Attorney General, *Will D. Davis* and *Frank C. Erwin, Jr.* for appellants.

William B. Cassin and *Thad T. Hutcheson* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed on the authority of *Wesberry* v. *Sanders, ante,* p. 1, without prejudice to the right of the appellants to apply by April 1, 1964, to the District Court for further equitable relief in light of the present circumstances including the imminence of the forthcoming election and "the operation of the election machinery of Texas" noted by the District Court in its opinion.* The stay heretofore granted by MR. JUSTICE BLACK is continued in effect pending timely application for the foregoing relief and final disposition thereof by the District Court.

MR. JUSTICE CLARK joins this disposition, but upon the grounds stated in his separate opinion in *Wesberry* v. *Sanders, ante,* p. 18.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would reverse the judgment below for the reasons stated in their dissenting opinions in *Wesberry* v. *Sanders, ante,* pp. 20, 50.

*224 F. Supp. 499, 513.

CITY OF SEATTLE ET AL. *v.* BEEZER ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 677. Decided March 2, 1964.

Appeal dismissed; certiorari granted; and judgment reversed.
Reported below: 62 Wash. 2d 569, 383 P. 2d 895.

A. L. Newbould, Richard S. White, William A. Helsell, Robert L. McCarty and *Charles F. Wheatley, Jr.* for appellants.

Alfred J. Schweppe for Beezer, and *Clarence C. Dill, Joseph Volpe, Jr.* and *Bennett Boskey* for Public Utility District No. 1 of Pend Oreille County, Washington, appellees.

Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock and *David J. Bardin* for the Federal Power Commission, as *amicus curiae,* in support of appellants.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted and the judgment is reversed. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U. S. 320.

SEARS, ROEBUCK & CO. *v.* STIFFEL COMPANY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 108. Argued January 16, 1964.—Decided March 9, 1964.

Respondent, whose design and mechanical patents are invalid for want of invention, cannot under a state unfair competition law obtain an injunction against copying its product or an award of damages for such copying, as such use of state law conflicts with the exclusive power of the Federal Government to grant patents only to true inventions, and then only for a limited time. An unpatented article, being in the public domain, may be freely copied, though labeling or other precautions may be required by state law where appropriate to prevent deception as to source. Pp. 225–233.

313 F. 2d 115, reversed.

Will Freeman argued the cause for petitioner. With him on the briefs were *Frank H. Marks, D. D. Allegretti* and *George B. Newitt.*

Warren C. Horton argued the cause for respondent. With him on the brief was *Max R. Kraus.*

Solicitor General Cox, Assistant Attorney General Orrick, Daniel M. Friedman and *Lionel Kestenbaum* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question in this case is whether a State's unfair competition law can, consistently with the federal patent laws, impose liability for or prohibit the copying of an article which is protected by neither a federal patent nor a copyright. The respondent, Stiffel Company, secured design and mechanical patents on a "pole lamp"—a ver-

tical tube having lamp fixtures along the outside, the tube being made so that it will stand upright between the floor and ceiling of a room. Pole lamps proved a decided commercial success, and soon after Stiffel brought them on the market Sears, Roebuck & Company put on the market a substantially identical lamp, which it sold more cheaply, Sears' retail price being about the same as Stiffel's wholesale price. Stiffel then brought this action against Sears in the United States District Court for the Northern District of Illinois, claiming in its first count that by copying its design Sears had infringed Stiffel's patents and in its second count that by selling copies of Stiffel's lamp Sears had caused confusion in the trade as to the source of the lamps and had thereby engaged in unfair competition under Illinois law. There was evidence that identifying tags were not attached to the Sears lamps although labels appeared on the cartons in which they were delivered to customers, that customers had asked Stiffel whether its lamps differed from Sears', and that in two cases customers who had bought Stiffel lamps had complained to Stiffel on learning that Sears was selling substantially identical lamps at a much lower price.

The District Court, after holding the patents invalid for want of invention, went on to find as a fact that Sears' lamp was "a substantially exact copy" of Stiffel's and that the two lamps were so much alike, both in appearance and in functional details, "that confusion between them is likely, and some confusion has already occurred." On these findings the court held Sears guilty of unfair competition, enjoined Sears "from unfairly competing with [Stiffel] by selling or attempting to sell pole lamps identical to or confusingly similar to" Stiffel's lamp, and ordered an accounting to fix profits and damages resulting from Sears' "unfair competition."

The Court of Appeals affirmed.[1] 313 F. 2d 115. That court held that, to make out a case of unfair competition under Illinois law, there was no need to show that Sears had been "palming off" its lamps as Stiffel lamps; Stiffel had only to prove that there was a "likelihood of confusion as to the source of the products"—that the two articles were sufficiently identical that customers could not tell who had made a particular one. Impressed by the "remarkable sameness of appearance" of the lamps, the Court of Appeals upheld the trial court's findings of likelihood of confusion and some actual confusion, findings which the appellate court construed to mean confusion "as to the source of the lamps." The Court of Appeals thought this enough under Illinois law to sustain the trial court's holding of unfair competition, and thus held Sears liable under Illinois law for doing no more than copying and marketing an unpatented article.[2] We granted certiorari to consider whether this

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[1] No review is sought here of the ruling affirming the District Court's holding that the patent is invalid.

[2] 313 F. 2d, at 118 and nn. 6, 7. At least one Illinois case has held in an exhaustive opinion that unfair competition under the law of Illinois is not proved unless the defendant is shown to have "palmed off" the article which he sells as that of another seller; the court there said that "[t]he courts in this State do not treat the 'palming off' doctrine as merely the designation of a typical class of cases of unfair competition, but they announce it as the rule of law itself—the test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law. . . . The 'palming off' rule is expressed in a positive, concrete form which will not admit of 'broadening' or 'widening' by any proper judicial process." *Stevens-Davis Co.* v. *Mather & Co.*, 230 Ill. App. 45, 65–66 (1923). In spite of this the Court of Appeals in its opinions both in this case and in *Day-Brite Lighting, Inc.*, v. *Compco Corp.*, 311 F. 2d 26, rev'd, *post*, p. 234, relied upon one of its previous decisions in a trade-name case, *Independent Nail & Packing Co.* v. *Stronghold Screw Products*, 205 F. 2d 921 (C. A. 7th Cir. 1953), which concluded that as to use

use of a State's law of unfair competition is compatible with the federal patent law. 374 U. S. 826.

Before the Constitution was adopted, some States had granted patents either by special act or by general statute,[3] but when the Constitution was adopted provision for a federal patent law was made one of the enumerated powers of Congress because, as Madison put it in *The Federalist* No. 43, the States "cannot separately make effectual provision" for either patents or copyrights.[4] That constitutional provision is Art. I, § 8, cl. 8, which empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Pursuant to this constitu-

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of trade names the *Stevens-Davis* rule had been overruled by two subsequent Illinois decisions. Those two cases, however, discussed only misleading use of trade names, not copying of articles of trade. One prohibited the use of a name so similar to that of another seller as to deceive or confuse customers, even though the defendant company did not sell the same products as the plaintiff and so in one sense could not be said to have palmed off its goods as those of a competitor, since the plaintiff was not a competitor. *Lady Esther, Ltd.*, v. *Lady Esther Corset Shoppe, Inc.*, 317 Ill. App. 451, 46 N. E. 2d 165 (1943). The other Illinois case on which the Court of Appeals relied was a mandamus action which held that under an Illinois statute a corporation was properly denied registration in the State when its name was "deceptively similar" to that of a corporation already registered. *Investors Syndicate of America, Inc.*, v. *Hughes*, 378 Ill. 413, 38 N. E. 2d 754 (1941). The Court of Appeals, by holding that because Illinois forbids misleading use of trade names it also forbids as unfair competition the mere copying of an article of trade without any palming off, thus appears to have extended greatly the scope of the Illinois law of unfair competition beyond the limits indicated in the Illinois cases and beyond any previous decisions of the Seventh Circuit itself. Because of our disposition of these cases we need not decide whether it was correct in doing so.

[3] See I Walker, Patents (Deller ed. 1937), § 7.

[4] The Federalist (Cooke ed. 1961) 288.

tional authority, Congress in 1790 enacted the first federal patent and copyright law, 1 Stat. 109, and ever since that time has fixed the conditions upon which patents and copyrights shall be granted, see 17 U. S. C. §§ 1–216; 35 U. S. C. §§ 1–293. These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. See *Sperry* v. *Florida*, 373 U. S. 379 (1963). When state law touches upon the area of these federal statutes, it is "familiar doctrine" that the federal policy "may not be set at naught, or its benefits denied" by the state law. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 176 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.

The grant of a patent is the grant of a statutory monopoly; [5] indeed, the grant of patents in England was an explicit exception to the statute of James I prohibiting monopolies.[6] Patents are not given as favors, as was the case of monopolies given by the Tudor monarchs, see *The Case of Monopolies* (*Darcy* v. *Allein*), 11 Co. Rep. 84 b., 77 Eng. Rep. 1260 (K. B. 1602), but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention. During that period of time no one may make, use, or sell the patented

[5] Patent rights exist only by virtue of statute. *Wheaton* v. *Peters*, 8 Pet. 591, 658 (1834).

[6] The Statute of Monopolies, 21 Jac. I, c. 3 (1623), declared all monopolies "contrary to the Laws of this Realm" and "utterly void and of none Effect." Section VI, however, excepted patents of 14 years to "the true and first Inventor and Inventors" of "new Manufactures" so long as they were "not contrary to the Law, nor mischievous to the State, by raising Prices of Commodities at home, or Hurt of Trade, or generally inconvenient . . . ." Much American patent law derives from English patent law. See *Pennock* v. *Dialogue*, 2 Pet. 1, 18 (1829).

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product without the patentee's authority. 35 U. S. C. § 271. But in rewarding useful invention, the "rights and welfare of the community must be fairly dealt with and effectually guarded." *Kendall* v. *Winsor*, 21 How. 322, 329 (1859). To that end the prerequisites to obtaining a patent are strictly observed, and when the patent has issued the limitations on its exercise are equally strictly enforced. To begin with, a genuine "invention" or "discovery" must be demonstrated "lest in the constant demand for new appliances the heavy hand of tribute be laid on each slight technological advance in an art." *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 92 (1941); see *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 152–153 (1950); *Atlantic Works* v. *Brady*, 107 U. S. 192, 199–200 (1883). Once the patent issues, it is strictly construed, *United States* v. *Masonite Corp.*, 316 U. S. 265, 280 (1942), it cannot be used to secure any monopoly beyond that contained in the patent, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492 (1942), the patentee's control over the product when it leaves his hands is sharply limited, see *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250–252 (1942), and the patent monopoly may not be used in disregard of the antitrust laws, see *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 463–464 (1922). Finally, and especially relevant here, when the patent expires the monopoly created by it expires, too, and the right to make the article—including the right to make it in precisely the shape it carried when patented—passes to the public. *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 120–122 (1938); *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169, 185 (1896).

Thus the patent system is one in which uniform federal standards are carefully used to promote invention

while at the same time preserving free competition.[7] Obviously a State could not, consistently with the Supremacy Clause of the Constitution,[8] extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.

In the present case the "pole lamp" sold by Stiffel has been held not to be entitled to the protection of either a mechanical or a design patent. An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel's design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws. That Stiffel originated the pole lamp and made it popular is immaterial. "Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested." *Kellogg Co.* v. *National Biscuit Co., supra,* 305 U. S., at 122. To allow a State by use of its law of unfair competition to prevent the copying of an article which rep-

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[7] The purpose of Congress to have national uniformity in patent and copyright laws can be inferred from such statutes as that which vests exclusive jurisdiction to hear patent and copyright cases in federal courts, 28 U. S. C. § 1338 (a), and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings, 17 U. S. C. § 2.

[8] U. S. Const., Art. VI.

resents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. The result would be that while federal law grants only 14 or 17 years' protection to genuine inventions, see 35 U. S. C. §§ 154, 173, States could allow perpetual protection to articles too lacking in novelty to merit any patent at all under federal constitutional standards. This would be too great an encroachment on the federal patent system to be tolerated.

Sears has been held liable here for unfair competition because of a finding of likelihood of confusion based only on the fact that Sears' lamp was copied from Stiffel's unpatented lamp and that consequently the two looked exactly alike. Of course there could be "confusion" as to who had manufactured these nearly identical articles. But mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied. Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source, just as it may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods.[9] But because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the

[9] It seems apparent that Illinois has not seen fit to impose liability on sellers who do not label their goods. Neither the discussions in the opinions below nor the briefs before us cite any Illinois statute or decision requiring labeling.

copying of the article itself or award damages for such copying. Cf. *G. Ricordi & Co.* v. *Haendler,* 194 F. 2d 914, 916 (C. A. 2d Cir. 1952). The judgment below did both and in so doing gave Stiffel the equivalent of a patent monopoly on its unpatented lamp. That was error, and Sears is entitled to a judgment in its favor.

Reversed.

[For concurring opinion of MR. JUSTICE HARLAN, see *post,* p. 239.]

COMPCO CORPORATION *v.* DAY-BRITE LIGHTING, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 106. Argued January 16, 1964.—Decided March 9, 1964.

Design which is not entitled to design patent may be copied at will even though it identifies maker to trade, and injunction against such copying or an accounting for damages for copying is in conflict with federal patent laws. *Sears, Roebuck & Co.* v. *Stiffel Co.*, *ante*, p. 225, followed. Pp. 234–239.

311 F. 2d 26, reversed.

Jerome F. Fallon argued the cause for petitioner. With him on the briefs were *Horace Dawson* and *John H. O. Clarke.*

Owen J. Ooms argued the cause for respondent. With him on the brief was *Roy A. Lieder.*

Solicitor General Cox, Assistant Attorney General Orrick, Daniel M. Friedman and *Lionel Kestenbaum* filed a brief for the United States, as *amicus curiae*, urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

As in *Sears, Roebuck & Co.* v. *Stiffel Co., ante*, p. 225, the question here is whether the use of a state unfair competition law to give relief against the copying of an unpatented industrial design conflicts with the federal patent laws. Both Compco and Day-Brite are manufacturers of fluorescent lighting fixtures of a kind widely used in offices and stores. Day-Brite in 1955 secured from the Patent Office a design patent on a reflector having cross-ribs claimed to give both strength and attractiveness to the fixture. Day-Brite also sought, but was refused, a mechanical patent on the same device. After Day-Brite

had begun selling its fixture, Compco's predecessor [1] began making and selling fixtures very similar to Day-Brite's. This action was then brought by Day-Brite. One count alleged that Compco had infringed Day-Brite's design patent; a second count charged that the public and the trade had come to associate this particular design with Day-Brite, that Compco had copied Day-Brite's distinctive design so as to confuse and deceive purchasers into thinking Compco's fixtures were actually Day-Brite's, and that by doing this Compco had unfairly competed with Day-Brite. The complaint prayed for both an accounting and an injunction.

The District Court held the design patent invalid; but as to the second count, while the court did not find that Compco had engaged in any deceptive or fraudulent practices, it did hold that Compco had been guilty of unfair competition under Illinois law. The court found that the overall appearance of Compco's fixture was "the same, to the eye of the ordinary observer, as the overall appearance" of Day-Brite's reflector, which embodied the design of the invalidated patent; that the appearance of Day-Brite's design had "the capacity to identify [Day-Brite] in the trade and does in fact so identify [it] to the trade"; that the concurrent sale of the two products was "likely to cause confusion in the trade"; and that "[a]ctual confusion has occurred." On these findings the court adjudged Compco guilty of unfair competition in the sale of its fixtures, ordered Compco to

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[1] The sales of which Day-Brite complained in this action had actually been made by the Mitchell Lighting Company. However, by the time the complaint was filed, Mitchell had been acquired by Compco, which was therefore the defendant in the action and is the petitioner here. For simplicity we shall throughout the opinion refer only to Compco even though the transactions for which Compco was sought to be held liable were those of the predecessor company, Mitchell.

account to Day-Brite for damages, and enjoined Compco "from unfairly competing with plaintiff by the sale or attempted sale of reflectors identical to, or confusingly similar to" those made by Day-Brite. The Court of Appeals held there was substantial evidence in the record to support the District Court's finding of likely confusion and that this finding was sufficient to support a holding of unfair competition under Illinois law.[2] 311 F. 2d 26. Although the District Court had not made such a finding, the appellate court observed that "several choices of ribbing were apparently available to meet the functional needs of the product," yet Compco "chose precisely the same design used by the plaintiff and followed it so closely as to make confusion likely." 311 F. 2d, at 30. A design which identifies its maker to the trade, the Court of Appeals held, is a "protectable" right under Illinois law, even though the design is unpatentable.[3] We granted certiorari. 374 U. S. 825.

To support its findings of likelihood of confusion and actual confusion, the trial court was able to refer to only one circumstance in the record. A plant manager who had installed some of Compco's fixtures later asked Day-Brite to service the fixtures, thinking they had been made by Day-Brite. There was no testimony given by a purchaser or by anyone else that any customer had ever been misled, deceived, or "confused," that is, that anyone had ever bought a Compco fixture thinking it was a Day-Brite fixture. All the record shows, as to the one instance cited by the trial court, is that both Compco and Day-Brite fixtures had been installed in the same plant, that three years later some repairs were needed, and that

[2] The Court of Appeals also affirmed the holding that the design patent was invalid. No review of this ruling is sought here.

[3] As stated in *Sears, Roebuck & Co.* v. *Stiffel Co.*, *ante*, at p. 228, n. 2, we do not here decide whether the Court of Appeals was correct in its statement of Illinois law.

the manager viewing the Compco fixtures—hung at least 15 feet above the floor and arranged end to end in a continuous line so that identifying marks were hidden—thought they were Day-Brite fixtures and asked Day-Brite to service them.[4] Not only is this incident suggestive only of confusion *after* a purchase had been made, but also there is considerable evidence of the care taken by Compco to prevent customer confusion, including clearly labeling both the fixtures and the containers in which they were shipped and not selling through manufacturers' representatives who handled competing lines.

Notwithstanding the thinness of the evidence to support findings of likely and actual confusion among purchasers, we do not find it necessary in this case to determine whether there is "clear error" in these findings. They, like those in *Sears, Roebuck & Co.* v. *Stiffel Co., supra,* were based wholly on the fact that selling an article which is an exact copy of another unpatented article is likely to produce and did in this case produce confusion as to the source of the article. Even accepting the findings, we hold that the order for an accounting for damages and the injunction are in conflict with the federal patent laws. Today we have held in *Sears, Roebuck & Co.* v. *Stiffel Co., supra,* that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal pat-

[4] The only testimony about this incident was given by a sales representative of Day-Brite, who said that the plant manager had climbed up on a forklift truck to look at the fixtures. The manager was not called as a witness.

ent laws it is, therefore, in the public domain and can be copied in every detail by whoever pleases. It is true that the trial court found that the configuration of Day-Brite's fixture identified Day-Brite to the trade because the arrangement of the ribbing had, like a trademark, acquired a "secondary meaning" by which that particular design was associated with Day-Brite. But if the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will.

As we have said in *Sears*, while the federal patent laws prevent a State from prohibiting the copying and selling of unpatented articles, they do not stand in the way of state law, statutory or decisional, which requires those who make and sell copies to take precautions to identify their products as their own. A State of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original. That an article copied from an unpatented article could be made in some other way, that the design is "nonfunctional" and not essential to the use of either article, that the configuration of the article copied may have a "secondary meaning" which identifies the maker to the trade, or that there may be "confusion" among purchasers as to which article is which or as to who is the maker, may be relevant evidence in applying a State's law requiring such precautions as labeling; however, and regardless of the copier's motives, neither these facts nor any others can furnish a basis for imposing liability for or prohibiting the actual acts of copying and selling. Cf. *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 120 (1938). And of course a State cannot hold a copier accountable in damages for failure to label or otherwise to identify his goods unless his failure is in violation of valid state statutory or decisional law requiring the copier to label or take other precautions to

prevent confusion of customers as to the source of the goods.[5]

Since the judgment below forbids the sale of a copy of an unpatented article and orders an accounting for damages for such copying, it cannot stand.

Reversed.

MR. JUSTICE HARLAN, concurring in the result.*

In one respect I would give the States more leeway in unfair competition "copying" cases than the Court's opinions would allow. If copying is found, other than by an inference arising from the mere act of copying, to have been undertaken with the dominant purpose and effect of palming off one's goods as those of another or of confusing customers as to the source of such goods, I see no reason why the State may not impose reasonable restrictions on the future "copying" itself. Vindication of the paramount federal interest at stake does not require a State to tolerate such specifically oriented predatory business practices. Apart from this, I am in accord with the opinions of the Court, and concur in both judgments since neither case presents the point on which I find myself in disagreement.

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[5] As we pointed out in *Sears, Roebuck & Co.* v. *Stiffel Co., ante,* p. 232, n. 9, there is no showing that Illinois has any such law.

*[This opinion applies also to No. 108, *Sears, Roebuck & Co.* v. *Stiffel Co., ante,* p. 225.]

PLATT, CHIEF JUDGE, U. S. DISTRICT COURT, *v.* MINNESOTA MINING & MANUFACTURING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 113. Argued January 9, 1964.—Decided March 9, 1964.

Respondent company, indicted for antitrust violations in an Illinois district, filed a motion to transfer the prosecution to the district of Minnesota under Rule 21 (b) of the Federal Rules of Criminal Procedure, which provides for the transfer of a multi-venue case where it would be "in the interest of justice." The trial judge denied the motion, enumerating ten separate factors, including the difficulty which he felt existed of obtaining a fair and impartial jury in Minnesota. On respondent's petition for a writ of mandamus, the Court of Appeals concluded that the improper finding as to a fair and impartial jury was the "most important" factor in the trial judge's denial of the transfer; made its own evaluation of the factors bearing on transfer; and ordered the transfer, having also decided that a criminal defendant has a right to be prosecuted in the district where he resides. *Held:*

1. The District Court's use of an inappropriate factor in denying the transfer to another district of a criminal prosecution does not empower the Court of Appeals to make a *de novo* examination of the record and exercise a discretionary function, which Rule 21 (b) commits to the trial judge, by ordering the transfer itself. Pp. 243–245.

2. In determining proper venue in a multi-venue criminal case, the location of the main office or "home" of a corporate defendant has no independent significance in determining whether transfer to that district would be "in the interest of justice." Pp. 245–246.

314 F. 2d 369, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick* and *Lionel Kestenbaum.*

John T. Chadwell argued the cause for respondent. With him on the brief were *Glenn W. McGee, Jean Engstrom, Allan J. Reniche* and *John L. Connolly.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Rule 21 (b) of the Federal Rules of Criminal Procedure provides that where it appears that an offense was committed in more than one district or division and the court "is satisfied that in the interest of justice the proceeding should be transferred" to another such district or division than the one wherein it is filed, the court shall, upon motion, transfer the case. The respondent filed such a motion to transfer this antitrust prosecution from the Eastern District of Illinois to the District of Minnesota. After a hearing, the trial judge denied this motion on the ground that the factors of convenience, expense and early trial, together with the fact that it "would be more difficult [for the Government] to get a fair and impartial jury in the Minnesota District," convinced him that "the interest of justice" would not be promoted by a transfer. The respondent then petitioned the Court of Appeals to issue a writ of mandamus [1] directing the transfer. The Court of Appeals found that the trial judge had treated the factor of a fair and impartial trial as the "most important item" [2] in his decision and that this was not an appropriate criterion. It concluded that in addition to "the essential elements of convenience, expense and early trial, constituting 'interest of justice' in a civil case," a criminal case was "impressed with the fundamental historical right of a defendant to be prosecuted in its own environment or district . . . ." [3] Upon reviewing the record, the Court of Appeals substituted its own findings for those of the trial judge and ordered the case transferred. 314 F. 2d 369. Chief Judge Hastings dissented.

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[1] The All Writs Act grants to the federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

[2] 314 F. 2d 369, 371, n. 1.

[3] *Id.*, at 375.

We granted the petition for certiorari in view of the importance of the questions to the prosecution of multi-venue cases. 374 U. S. 825. We believe that the Court of Appeals erred in ordering the transfer and therefore vacate its judgment and remand the case for further consideration by the District Court.

I.

A grand jury sitting at Danville, in the United States District Court for the Eastern District of Illinois, returned an indictment charging the respondent with violating §§ 1 and 2 of the Sherman Act. The indictment charged an attempt to monopolize and a conspiracy to restrain and monopolize interstate and foreign commerce in pressure-sensitive tape, magnetic recording media and aluminum presensitized lithographic plates. The offense was alleged to have been committed in part in the Eastern District of Illinois, which includes both Danville and East St. Louis. It is agreed that the indictment could have been returned in the District of Minnesota as well as several other districts.

The Court of Appeals found, in contradiction to the finding of the District Court, that a trial in the Eastern District of Illinois would result in unjustifiable increased expenses to the respondent of "at least $100,000, great inconvenience of witnesses, serious disruption of business and interference of contact between the [respondent's] executives and its trial attorneys . . . ."[4] It also found that respondent had no office, plant, or other facility in the Eastern District and that there was less congestion in the docket of the Minnesota District than in the Eastern District of Illinois. The court concluded that this was a "demonstration by proof or admission of the essential elements of convenience, expense and early trial, consti-

[4] *Id.*, at 375, n. 3.

tuting 'interest of justice' in a civil case," [5] which, augmented by the additional consideration that this was a criminal action, compelled the granting of the motion to transfer.

In awarding the mandamus the Court of Appeals placed particular weight on the trial judge's finding that it "would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois." The Court of Appeals stated that this finding, if true (which it doubted), "would not justify a refusal to make a transfer otherwise proper under rule 21 (b) . . ." [6] and concluded that "it would be an unsound and dangerous innovation in our federal court system for a judge in any district to appraise or even speculate as to the efficacy of the operations of a federal court of concurrent jurisdiction in another district. It follows that no order in any way based upon such reasoning can stand, even under the guise of an exercise of discretion." [7] The Court of Appeals, by way of footnote, then characterized the consideration of this factor by the trial judge as "the most important item" [8] despite the trial judge's statement in his answer to the rule to show cause that it "was but one of a number of factors . . . which led respondent to his conclusion."

II.

The trial judge in his memorandum decision listed a number of items as pertinent in the determination of whether the case should be transferred to Minnesota "in the interest of justice" as required by Rule 21 (b). As Chief Judge Hastings pointed out in his dissent, these "factors were (1) location of corporate defendant;

[5] *Id.*, at 375.
[6] *Id.*, at 373.
[7] *Id.*, at 375.
[8] *Id.*, at 371, n. 1.

(2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer." [9]

It appears that both parties and the Court of Appeals agree that the first nine factors enumerated were appropriate. As we have noted, the Court of Appeals struck the fair and impartial jury finding as not being a proper factor and the Government does not challenge that action here. Nor has the Government challenged the use of the extraordinary writ of mandamus as an appropriate means to review the refusal to transfer. We shall, therefore, not consider those matters here, assuming, without deciding, their validity for the purposes of this case. This leaves before us the question of whether the Court of Appeals erred in considering the motion to transfer *de novo* on the record made in the District Court and ordering transfer to the District of Minnesota.

III.

We cannot say, as did the Court of Appeals, that "the most important item" in the trial judge's mind when he ruled against transfer was the finding of difficulty in the selection of a fair and impartial jury in Minnesota. The weight that Judge Platt gave this factor is a matter so peculiarly within his own knowledge that it seems more appropriate to have him resolve it. He has represented in his answer that this "was but one of a number of factors." The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer.

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[9] *Id.*, at 376–377.

The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are "reserved for really extraordinary causes," *Ex parte Fahey,* 332 U. S. 258, 260 (1947), and then only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used "to actually control the decision of the trial court." *Bankers Life & Casualty Co.* v. *Holland,* 346 U. S. 379, 383 (1953).

IV.

Since the trial court must reconsider the motion, effective judicial administration requires that we comment upon the erroneous holding of the Court of Appeals that criminal defendants have a constitutionally based right to a trial in their home districts. Art. III, § 2, of the Constitution provides that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ." The Sixth Amendment carries a like command. As we said in *United States* v. *Cores,* 356 U. S. 405, 407 (1958): "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. . . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." The fact that Minnesota is the main office or "home" of the respondent has no independent significance in determining whether transfer to that district would be "in the interest of justice," although it may be con-

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sidered with reference to such factors as the convenience of records, officers, personnel and counsel.

The judgment of the Court of Appeals is therefore reversed and the cause is remanded to that court with instructions to vacate the judgment of the District Court and to remand the case for reconsideration of the motion for transfer, without reference to the ability of the United States to receive a fair and impartial trial in Minnesota.

It is so ordered.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following brief comments.

First, for myself I wish to make explicit what is indeed implicit in the Court's opinion, namely, that the Court of Appeals was entirely correct in holding that the District Court's speculation that the Government might not be able to obtain an impartial jury in the Minnesota District was wholly out of bounds.

Second, while the Court of Appeals' outright reversal of the District Court understandably reflects its view that the other factors making for a change of venue, when stripped of the impermissible "impartial jury" consideration, are indeed strong, such action cannot well be regarded as other than a *de novo* determination of the change of venue motion on the part of the Court of Appeals. Such a course inescapably contravenes accepted principles governing the exercise of appellate jurisdiction.

Syllabus.

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS, AFL–CIO, *v.* NEEDHAM PACKING CO., DOING BUSINESS AS SIOUX CITY DRESSED BEEF.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 102. Argued February 20, 1964.—Decided March 9, 1964.

Under § 301 (a) of the Labor Management Relations Act, petitioner labor union sued in a state court to compel arbitration of the claimed wrongful discharge of employees, the action being based on a collective bargaining agreement providing for arbitration at the union's request of disputes which the parties could not settle. Respondent employer contended that the union had struck in violation of a no-strike clause in that agreement, thereby terminating the employer's obligations thereunder, and it counterclaimed for damages for breach of the no-strike clause. The State Supreme Court affirmed a lower court ruling that the union by its walkout had waived its right to arbitrate the grievances. *Held:* The union's alleged breach of its promise in the collective bargaining agreement not to strike did not relieve the employer of its duty under such agreement to arbitrate, there being no inflexible rule that the duty to arbitrate depends upon observance of the promise not to strike. *Drake Bakeries, Inc.*, v. *Bakery Workers*, 370 U. S. 254, followed. Pp. 248–253.

(a) A state court exercising its concurrent jurisdiction over suits under § 301 (a) applies federal substantive law. P. 250.

(b) Though the employer is obliged to arbitrate the union's grievances it can pursue its claim for damages in the state court for the alleged breach of the no-strike clause. Pp. 252–253.

(c) The employer is not released from its duty to arbitrate by the passage of time resulting from its refusal to do so. P. 253.

254 Iowa 882, 119 N. W. 2d 141, reversed and remanded.

Richard F. Watt argued the cause for petitioner. With him on the briefs were *Eugene Cotton* and *Harry H. Smith.*

Alfred L. Scanlan argued the cause for respondent. With him on the brief were *James A. Gilker* and *Jesse E. Marshall.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case, which was brought here from the Supreme Court of Iowa, 374 U. S. 826, presents a problem concerning the relationship between an arbitration clause and a no-strike clause in a collective bargaining agreement.

Although this case comes to us on the pleadings and some disputed questions of fact are still to be resolved, we accept as true the following facts for the purposes of our decision. The petitioner, Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL–CIO, and the respondent, Needham Packing Co., had an agreement which included provisions of both kinds, set out hereafter. On May 11, 1961, Needham discharged Anton Stamoulis, an employee represented by the union. In response, on the same day about 190 other employees left work. During the next few days Needham advised the employees to return to work, stating that if they did not their employment would be regarded as terminated and that the discharge of Stamoulis would be treated under the grievance procedures of the collective bargaining agreement. The employees did not return to work.

On July 5, 1961, the union presented to Needham written grievances on behalf of Stamoulis and the other employees, asserting that they had been "improperly discharged" and requesting their reinstatement with full seniority rights and pay for lost time. By letter dated July 11, 1961, Needham refused to process the grievances. The letter stated that the union and its members had by their conduct "repudiated and terminated the labor agreement" with the company. In addition, Needham stated that it would not have further dealings with the union and did not recognize the union as majority representative of Needham employees.

This suit by the union under § 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a), to

compel arbitration of the two grievances followed. Needham alleged as a defense that the union and its members had struck on May 11, 1961, and that this breach of the no-strike clause of the collective bargaining agreement had been and was treated by Needham as having terminated its obligations under the agreement. In addition, Needham filed a counterclaim, alleging that it had been damaged in the amount of $150,000 by the union's breach of the no-strike clause. The union denied such breach. At the close of the pleadings, in accordance with Iowa procedure, Needham moved for a ruling on points of law and a final order denying the union's petition to compel arbitration.[1] Deciding solely on the basis of matters raised in the pleadings as to which there was no dispute, the trial court ruled in Needham's favor and issued an order against the union. The union obtained an appeal. The Supreme Court of Iowa affirmed the holding below that "the Union had waived its right to arbitrate the grievances filed by its walkout." 254 Iowa 882, 887, 119 N. W. 2d 141, 143.[2]

In the present posture of this case, we must answer the question whether acts of the union relieved Needham of

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[1] Rule 105 of the Iowa Rules of Civil Procedure provides:

"The court may in its discretion, and must on application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

[2] Although Rule 105 provides that a final order entered under it shall be "deemed interlocutory for purposes of appeal," the order which is entered is a "final order . . . adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose." See *supra*, note 1. Accordingly, our jurisdiction was properly invoked.

its contractual obligation to arbitrate almost entirely on the basis of the agreement itself. We think it plain that, seen from that perspective, the judgment below must be reversed.

The two controlling provisions of the collective bargaining agreement are written in comprehensive terms. The no-strike clause provides:

> "It is agreed that during the period of this agreement the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike . . . ."

The grievance provisions include typical procedures for the resolution of a dispute preliminary to arbitration. They then provide:

> "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union."

It is evident from the above as well as other provisions of the agreement [3] that the grievance procedures were intended largely, if not wholly, for the benefit of the union.

A state court exercising its concurrent jurisdiction over suits under § 301 (a) applies federal substantive law. *Charles Dowd Box Co., Inc.*, v. *Courtney*, 368 U. S. 502. The law which controls the disposition of this case is stated in *Drake Bakeries Inc.* v. *Local 50, American Bakery & Confectionery Workers International, AFL–*

[3] For example, the agreement provides that grievances must be presented within 14 days "of the occurrence giving rise to such grievance" or within 14 days "of the time the Union has knowledge, or should have had knowledge of such grievance . . . ."

CIO, 370 U. S. 254. In that case, the employer had filed an action for damages under § 301 (a), alleging that the union had "instigated and encouraged its members to strike or not to report for work," in violation of a no-strike clause. *Id.*, at 256. The collective bargaining agreement contained a broad arbitration clause covering "all complaints, disputes or grievances arising between . . . [the parties] involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly." *Id.*, at 257.

The employer argued that the promise not to strike was so basic to the collective bargain and breach of the no-strike clause so completely inconsistent with the provision for arbitration that the employer's duty to arbitrate was excused by the union's breach. This argument, which is essentially that of Needham here, was rejected on grounds fully applicable to this case. Although the Court relied in part on the employer's apparent intention not to terminate the contract altogether, more central to its conclusion was the view that there was no "inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation." *Id.*, at 261. (Footnote omitted.) We said:

> ". . . [U]nder this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise. Arbitration provisions, which themselves have not been repudiated, are meant to

> survive breaches of contract, in many contexts, even total breach; and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important. In this case the union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself which ignored the adjustment and arbitration provisions by scheduling holiday work." *Id.*, at 262–263. (Footnotes omitted.)

Continuance of the duty to arbitrate is, if anything, clearer here than it was in *Drake Bakeries*, where one of the issues was whether an alleged strike was within the intended scope of the arbitration clause. There is no question in this case that the union's claim of wrongful discharge is one which Needham agreed to arbitrate.[4] Nothing in the agreement indicates an intention to except from Needham's agreement to arbitrate disputes concerning the "interpretation or application" of the agreement any dispute which involves or follows an alleged breach of the no-strike clause. That the no-strike clause does not itself carry such an implication is the holding of *Drake Bakeries*.

The fact that the collective bargaining agreement does not require Needham to submit its claim to arbitration, as the employer was required to do in *Drake Bakeries*, and indeed appears to confine the grievance procedures to grievances of the union, does not indicate a different result. Needham's claim is the subject of a counterclaim in the Iowa courts; nothing we have said here precludes

[4] In effect, the union's grievance involved the "interpretation or application" of § 8 (a) of the collective bargaining agreement, which provided that Needham could discharge employees "for just cause."

it from prosecuting that claim and recovering damages.[5] That Needham asserts by way of defense to the union's action to compel arbitration the same alleged breach of the no-strike clause which is the subject of the counterclaim does not convert the union's grievance into Needham's different one.[6]

Nor do we believe that this case can be distinguished from *Drake Bakeries* on the ground that that case involved only a "one-day strike," *id.*, at 265. Whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate we need not decide, since the undeveloped record before us reveals no such circumstance. Compare *Drake Bakeries, supra,* at 265. The passage of time resulting from Needham's refusal to arbitrate cannot, of course, be a basis for releasing it from its duty to arbitrate.

Needham's allegations by way of defense and counterclaim that the union breached the no-strike clause, supported by such facts as were undisputed on the pleadings, did not release Needham from its duty to arbitrate the union's claim that employees had been wrongfully discharged. On that basis, we reverse and remand to the Iowa Supreme Court for further proceedings.

It is so ordered.

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[5] Here, as in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, we find it unnecessary to decide what effect, if any, factual or legal determinations of an arbitrator would have on a related action in the courts. See *id.*, at 245, note 5.

[6] *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, in which the provision for arbitration was similarly limited to employee grievances, is of no relevance here, since the question in that case was whether the *employer's* action for breach of the no-strike clause should be submitted to arbitration.

NEW YORK TIMES CO. *v.* SULLIVAN.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 39. Argued January 6, 1964.—Decided March 9, 1964.*

Respondent, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in corporate petitioner's newspaper, the text of which appeared over the names of the four individual petitioners and many others. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages, and that for the purpose of compensatory damages malice was presumed, so that such damages could be awarded against petitioners if the statements were found to have been published by them and to have related to respondent. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice and would not justify an award of punitive damages; he refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for respondent should differentiate between compensatory and punitive damages. The jury found for respondent and the State Supreme Court affirmed. *Held:* A State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Pp. 265–292.

(a) Application by state courts of a rule of law, whether statutory or not, to award a judgment in a civil action, is "state action" under the Fourteenth Amendment. P. 265.

(b) Expression does not lose constitutional protection to which it would otherwise be entitled because it appears in the form of a paid advertisement. Pp. 265–266.

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*Together with No. 40, *Abernathy et al.* v. *Sullivan*, also on certiorari to the same court, argued January 7, 1964.

(c) Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless "actual malice"—knowledge that statements are false or in reckless disregard of the truth—is alleged and proved. Pp. 279–283.

(d) State court judgment entered upon a general verdict which does not differentiate between punitive damages, as to which under state law actual malice must be proved, and general damages, as to which it is "presumed," precludes any determination as to the basis of the verdict and requires reversal, where presumption of malice is inconsistent with federal constitutional requirements. P. 284.

(e) The evidence was constitutionally insufficient to support the judgment for respondent, since it failed to support a finding that the statements were made with actual malice or that they related to respondent. Pp. 285–292.

273 Ala. 656, 144 So. 2d 25, reversed and remanded.

Herbert Wechsler argued the cause for petitioner in No. 39. With him on the brief were *Herbert Brownell, Thomas F. Daly, Louis M. Loeb, T. Eric Embry, Marvin E. Frankel, Ronald S. Diana* and *Doris Wechsler.*

William P. Rogers and *Samuel R. Pierce, Jr.* argued the cause for petitioners in No. 40. With *Mr. Pierce* on the brief were *I. H. Wachtel, Charles S. Conley, Benjamin Spiegel, Raymond S. Harris, Harry H. Wachtel, Joseph B. Russell, David N. Brainin, Stephen J. Jelin* and *Charles B. Markham.*

M. Roland Nachman, Jr. argued the cause for respondent in both cases. With him on the brief were *Sam Rice Baker* and *Calvin Whitesell.*

Briefs of *amici curiae,* urging reversal, were filed in No. 39 by *William P. Rogers, Gerald W. Siegel* and *Stanley Godofsky* for the Washington Post Company, and by *Howard Ellis, Keith Masters* and *Don H. Reuben* for the Tribune Company. Brief of *amici curiae,* urging reversal, was filed in both cases by *Edward S. Greenbaum, Harriet F. Pilpel, Melvin L. Wulf, Nanette Dembitz* and *Nancy F. Wechsler* for the American Civil Liberties Union et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So. 2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960.[1] Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding

[1] A copy of the advertisement is printed in the Appendix.

paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have

> assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.[2] As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My

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[2] Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.[3] One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately $4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Ac-

[3] Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

ceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the

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Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman . . . ." On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous per se" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous *per se*, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' con-

tention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So. 2d 25. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury . . . , such injury being implied." *Id.*, at 673, 676, 144 So. 2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." *Id.*, at 674–675, 144 So. 2d, at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that,

apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." *Id.*, at 686–687, 144 So. 2d, at 50–51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." *Id.*, at 686, 144 So. 2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U. S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." *Id.*, at 676, 144 So. 2d, at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U. S. 946. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.[4] We

[4] Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See *Thompson* v. *Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 454–458.

further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, *e. g.*, Alabama Code, Tit. 7, §§ 908–917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia*, 100 U. S. 339, 346–347; *American Federation of Labor* v. *Swing*, 312 U. S. 321.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, "commercial" advertisement. The argument relies on *Valentine* v. *Chrestensen*, 316 U. S. 52, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for "the freedom of communicating

information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith* v. *California*, 361 U. S. 147, 150; cf. *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Schneider* v. *State*, 308 U. S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.[5]

[5] See American Law Institute, Restatement of Torts, § 593, Comment b (1938).

II.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . ." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co.* v. *Vance,* 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 494–495, 124 So. 2d 441, 457–458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons* v. *Age-Herald Publishing Co.,* 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co.* v. *Davis, supra,* 271 Ala., at 495, 124 So. 2d, at 458.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.[6] Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp* v. *Florida*, 328 U. S. 331, 348–349, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais* v. *Illinois*, 343 U. S. 250, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Id.*, at 263–264, and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. *Schenectady Union Pub. Co.* v. *Sweeney*, 316 U. S. 642.

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[6] *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 49, and n. 10; *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 48; *Roth* v. *United States*, 354 U. S. 476, 486–487; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Pennekamp* v. *Florida*, 328 U. S. 331, 348–349; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 715.

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429. Like insurrection,[7] contempt,[8] advocacy of unlawful acts,[9] breach of the peace,[10] obscenity,[11] solicitation of legal business,[12] and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359, 369. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges* v. *California,* 314 U. S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429.

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[7] *Herndon* v. *Lowry,* 301 U. S. 242.

[8] *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331.

[9] *De Jonge* v. *Oregon,* 299 U. S. 353.

[10] *Edwards* v. *South Carolina,* 372 U. S. 229.

[11] *Roth* v. *United States,* 354 U. S. 476.

[12] *N. A. A. C. P.* v. *Button,* 371 U. S. 415.

The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 375–376, gave the principle its classic formulation:

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4; *De Jonge* v. *Oregon*, 299 U. S. 353,

365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525–526. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In *Cantwell* v. *Connecticut*, 310 U. S. 296, 310, the Court declared:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of ex-

pression are to have the "breathing space" that they "need . . . to survive," *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney* v. *Patterson*, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458 (1942), cert. denied, 317 U. S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

> "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate." [13]

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and

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[13] See also Mill, On Liberty (Oxford: Blackwell, 1947), at 47:

". . . [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges* v. *California,* 314 U. S. 252. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp* v. *Florida,* 328 U. S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig* v. *Harney,* 331 U. S. 367; *Wood* v. *Georgia,* 370 U. S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig* v. *Harney, supra,* 331 U. S., at 376, surely the same must be true of other government officials, such as elected city commissioners.[14] Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 *et seq.;* Smith, Freedom's Fetters (1956), at 426, 431, and *passim.* That statute made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious

[14] The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875 (1949).

For a similar description written 60 years earlier, see Chase, Criticism of Public Officers and Candidates for Office, 23 Am. L. Rev. 346 (1889).

writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

> "doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, *supra,* pp. 553–554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is

it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id.*, pp. 569–570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." 4 Elliot's Debates, *supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.[15]

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[15] The Report on the Virginia Resolutions further stated:

"[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 Elliot's Debates, *supra*, p. 575.

Although the Sedition Act was never tested in this Court,[16] the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, *e. g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams* v. *United States*, 250 U. S. 616, 630; Jackson, J., dissenting in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288–289; Douglas, The Right of the People (1958), p. 47. See also Cooley, Constitutional Limitations (8th ed., Carrington, 1927), pp. 899–900; Chafee, Free Speech in the United States (1942), pp. 27–28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and

[16] The Act expired by its terms in 1801.

that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis* v. *United States,* 341 U. S. 494, 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, *e. g., Gitlow* v. *New York,* 268 U. S. 652, 666; *Schneider* v. *State,* 308 U. S. 147, 160; *Bridges* v. *California,* 314 U. S. 252, 268; *Edwards* v. *South Carolina,* 372 U. S. 229, 235.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.[17] The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 607, 139 N. E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.

[17] Cf. *Farmers Union* v. *WDAY,* 360 U. S. 525, 535.

And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.[18] Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 70.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith* v. *California*, 361 U. S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

> "For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitu-

[18] The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000.

> tionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 U. S. 147, 153–154.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, *e. g., Post Publishing Co.* v. *Hallam,* 59 F. 530, 540 (C. A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser* v. *Randall, supra,* 357 U. S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made

[19] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol. II, at 561.

with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,[20] is found in the Kansas case of *Coleman* v. *MacLennan*, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

> "where an article is published and circulated among voters for the sole purpose of giving what the de-

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[20] *E. g.*, *Ponder* v. *Cobb*, 257 N. C. 281, 299, 126 S. E. 2d 67, 80 (1962); *Lawrence* v. *Fox*, 357 Mich. 134, 146, 97 N. W. 2d 719, 725 (1959); *Stice* v. *Beacon Newspaper Corp.*, 185 Kan. 61, 65–67, 340 P. 2d 396, 400–401 (1959); *Bailey* v. *Charleston Mail Assn.*, 126 W. Va. 292, 307, 27 S. E. 2d 837, 844 (1943); *Salinger* v. *Cowles*, 195 Iowa 873, 889, 191 N. W. 167, 174 (1922); *Snively* v. *Record Publishing Co.*, 185 Cal. 565, 571–576, 198 P. 1 (1921); *McLean* v. *Merriman*, 42 S. D. 394, 175 N. W. 878 (1920). Applying the same rule to candidates for public office, see, *e. g.*, *Phoenix Newspapers* v. *Choisser*, 82 Ariz. 271, 276–277, 312 P. 2d 150, 154 (1957); *Friedell* v. *Blakely Printing Co.*, 163 Minn. 226, 230, 203 N. W. 974, 975 (1925). And see *Chagnon* v. *Union-Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961), cert. denied, 369 U. S. 830.

The consensus of scholarly opinion apparently favors the rule that is here adopted. *E. g.*, 1 Harper and James, Torts, § 5.26, at 449–450 (1956); Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 891–895, 897, 903 (1949); Hallen, Fair Comment, 8 Tex. L. Rev. 41, 61 (1929); Smith, Charges Against Candidates, 18 Mich. L. Rev. 1, 115 (1919); Chase, Criticism of Public Officers and Candidates for Office, 23 Am. L. Rev. 346, 367–371 (1889); Cooley, Constitutional Limitations (7th ed., Lane, 1903), at 604, 616–628. But see, *e. g.*, American Law Institute, Restatement of Torts, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041 (2) (1936)); Veeder, Freedom of Public Discussion, 23 Harv. L. Rev. 413, 419 (1910).

> fendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P., at 286):

> "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged."

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

> "In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of

public concern, public men, and candidates for office." 78 Kan., at 723, 98 P., at 285.

Such a privilege for criticism of official conduct [21] is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr* v. *Matteo*, 360 U. S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.[22] But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr* v. *Matteo, supra*, 360 U. S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney* v. *California*, 274 U. S. 357, 375 (concurring opinion of Mr. Justice Brandeis), quoted *supra*, p. 270. As Madison said, see *supra*, p. 275, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct

[21] The privilege immunizing honest misstatements of fact is often referred to as a "conditional" privilege to distinguish it from the "absolute" privilege recognized in judicial, legislative, administrative and executive proceedings. See, *e. g.*, Prosser, Torts (2d ed., 1955), § 95.

[22] See 1 Harper and James, Torts, § 5.23, at 429–430 (1956); Prosser, Torts (2d ed., 1955), at 612–613; American Law Institute, Restatement of Torts (1938), § 591.

did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages,[24] where general damages are concerned malice is "presumed." Such a presumption is inconsistent

[23] We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U. S. 564, 573–575. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

[24] *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960). Thus, the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel." [*Footnote 24 continued on p. 284*]

with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey* v. *Alabama*, 219 U. S. 219, 239; "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff . . . ." *Lawrence* v. *Fox*, 357 Mich. 134, 146, 97 N. W. 2d 719, 725 (1959).[25] Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg* v. *California*, 283 U. S. 359, 367–368; *Williams* v. *North Carolina*, 317 U. S. 287, 291–292; see *Yates* v. *United States*, 354 U. S. 298, 311–312; *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to deter-

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The court refused, however, to give the following instruction which had been requested by the Times:

"I charge you . . . that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, . . . and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant . . . was motivated by personal ill will, that is actual intent to do the plaintiff harm, or that the defendant . . . was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights."

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

[25] Accord, *Coleman* v. *MacLennan*, *supra*, 78 Kan., at 741, 98 P., at 292; *Gough* v. *Tribune-Journal Co.*, 75 Idaho 502, 510, 275 P. 2d 663, 668 (1954).

mine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.*, v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.[26]

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing

[26] The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 242–243; cf. *The Justices* v. *Murray*, 9 Wall. 274. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske* v. *Kansas*, 274 U. S. 380, 385–386. See also *Haynes* v. *Washington*, 373 U. S. 503, 515–516.

clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct"—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the

necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; [27] their failure to reject it on this ground was not unreasonable. We think

[27] The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and . . . may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. *Charles Parker Co.* v. *Silver City Crystal Co.*, 142 Conn. 605, 618, 116 A. 2d 440, 446 (1955); *Phoenix Newspapers, Inc.*, v. *Choisser*, 82 Ariz. 271, 277–278, 312 P. 2d 150, 154–155 (1957).

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

> "The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor . . . ; a real estate and insurance man . . . ; the sales manager of a men's clothing store . . . ; a food equipment man . . . ; a service station operator . . . ; and the operator of a truck line for whom respondent had formerly worked . . . . Each of these witnesses stated that he associated the statements with respondent . . . ." (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts

in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.[28] This reliance on the bare

[28] Respondent's own testimony was that "as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it [a statement] is associated with me when it describes police activities." He thought that "by virtue of being

fact of respondent's official position [29] was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that the libelous

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Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "It is my feeling that it reflects not only on me but on the other Commissioners and the community."

Grover C. Hall testified that to him the third paragraph of the advertisement called to mind "the City government—the Commissioners," and that "now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary." It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position." "I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that." Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it." In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery

[*Footnote 29 is on p. 291*]

matter was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

> "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala., at 674–675, 144 So. 2d, at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 601, 139 N. E.

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would have to put his approval on those kind of things as an individual."

William M. Parker, Jr., testified that he associated the statements in the two paragraphs with "the Commissioners of the City of Montgomery," and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truck-loads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."

[29] Compare *Ponder* v. *Cobb*, 257 N. C. 281, 126 S. E. 2d 67 (1962).

86, 88 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.[30] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[30] Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Ante*, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail

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to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof, however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which

might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr* v. *Matteo,* 360 U. S. 564. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about "malice," "truth," "good motives," "justifiable ends," or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.[1] This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United

[1] See cases collected in *Speiser* v. *Randall,* 357 U. S. 513, 530 (concurring opinion).

States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.[2] Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798,[3] which made it a crime—"seditious libel"—to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, *ante,* pp. 273–276, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth* v. *United States,* 354 U. S. 476, and "fighting words," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, are not expression within the protection of the First Amendment,[4] freedom to discuss public affairs and public officials

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[2] See, *e. g.,* 1 Tucker, Blackstone's Commentaries (1803), 297–299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

[3] Act of July 14, 1798, 1 Stat. 596.

[4] But see *Smith* v. *California,* 361 U. S. 147, 155 (concurring opinion); *Roth* v. *United States,* 354 U. S. 476, 508 (dissenting opinion).

is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." [5] An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.[6]

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with

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[5] 1 Tucker, Blackstone's Commentaries (1803), 297 (editor's appendix); cf. Brant, Seditious Libel: Myth and Reality, 39 N. Y. U. L. Rev. 1.

[6] Cf. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Ante*, at 279–280. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history [1] and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's mind," cf. *Bridges* v. *California*, 314 U. S. 252, 270, about public officials and affairs needs "breathing space to survive," *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433. The right should not depend upon a probing by the jury of the motivation [2] of the citizen or press. The theory

[1] I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, "has carried the day in the court of history," *ante*, at 276, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were "false, scandalous *and malicious*." (Emphasis added.) For prosecutions under the Sedition Act charging malice, see, *e. g.*, Trial of Matthew Lyon (1798), in Wharton, State Trials of the United States (1849), p. 333; Trial of Thomas Cooper (1800), in *id.*, at 659; Trial of Anthony Haswell (1800), in *id.*, at 684; Trial of James Thompson Callender (1800), in *id.*, at 688.

[2] The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in *United States* v. *Ballard*, 322 U. S. 78, 92–93, is relevant here: "[A]s a matter of either practice or philosophy I do not see how

of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 601, 139 N. E. 86, 88. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.[3] As the Court notes, although there have been

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we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen." See note 4, *infra*.

[3] It was not until *Gitlow* v. *New York*, 268 U. S. 652, decided in 1925, that it was intimated that the freedom of speech guaranteed by

"statements of this Court to the effect that the Constitution does not protect libelous publications . . . [n]one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." *Ante,* at 268. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. *Farmers Educational & Coop. Union* v. *WDAY, Inc.,* 360 U. S. 525, 530. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms

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the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See *Whitney* v. *California,* 274 U. S. 357; *Fiske* v. *Kansas,* 274 U. S. 380. In 1931 Chief Justice Hughes speaking for the Court in *Stromberg* v. *California,* 283 U. S. 359, 368, declared: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675, 721–722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. *Sweeney* v. *Patterson*, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458.

Our national experience teaches that repressions breed hate and "that hate menaces stable government." *Whitney* v. *California*, 274 U. S. 357, 375 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

> "[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge* v. *Oregon*, 299 U. S. 353, 365.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not

abridge the freedom of public speech or any other freedom protected by the First Amendment.[4] This, of course, cannot be said "where public officials are concerned or where public matters are involved. . . . [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." Douglas, The Right of the People (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, *e. g.*, *Barr* v. *Matteo*, 360 U. S. 564; *City of Chicago* v. *Tribune Co.*, 307 Ill., at 610, 139 N. E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the

[4] In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, *supra*.

case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581.

If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, *Barr* v. *Matteo, supra,* at 571, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important." [5] If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.[6]

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . . ." *Wood* v. *Georgia,* 370 U. S. 375, 389. The public

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[5] MR. JUSTICE BLACK concurring in *Barr* v. *Matteo,* 360 U. S. 564, 577, observed that: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

[6] See notes 2, 4, *supra.*

official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell* v. *Connecticut*, 310 U. S. 296, 310. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants." [7]

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

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[7] See Freund, The Supreme Court of the United States (1949), p. 61.

YIATCHOS *v.* YIATCHOS, EXECUTRIX, ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 48. Argued January 7, 1964.—Decided March 9, 1964.

Husband, who resided in a community property state, purchased with community funds United States Savings Bonds registered in his name with his brother, the petitioner, named as beneficiary. The husband's will left all cash and bonds to petitioner, four sisters, and a nephew. Petitioner sued to establish ownership of the savings bonds, relying on 31 CFR § 315.66, providing that on the registered owner's death the beneficiary will be recognized as owner. The State Supreme Court, affirming the judgment of the lower court that half the savings bonds were to go to the wife and the other half under the will, held that the husband's purchase of such bonds out of community funds constituted "constructive fraud" of the wife's rights. *Held:* Under 31 CFR § 315.66 petitioner, in accordance with *Free* v. *Bland*, 369 U. S. 663, must be recognized as owner of all the savings bonds unless their purchase by the husband was a fraud on his wife's property rights or a breach of trust with respect thereto—concerning which the case is remanded for establishment of the facts; but in any event petitioner is entitled to one-half the savings bonds (subject to possible allocation for debts) since the husband owned a half interest in them which he could dispose of to the beneficiary of his choice. Pp. 309–313.

(a) If the wife consented to or ratified the bond purchase, there was no fraud. P. 310.

(b) If under state law a widow's half interest is in the estate generally, rather than in each asset thereof, all the savings bonds must go to petitioner since they constituted less than half of the gross estate; otherwise, and in the absence of the widow's consent or ratification, she is entitled to one-half the savings bonds and petitioner the other. Pp. 310–312.

60 Wash. 2d 179, 373 P. 2d 125, reversed in part; vacated in part and remanded.

Ernest R. Whitmore, Jr. argued the cause for petitioner. With him on the brief was *Richard G. Jeffers.*

Charles W. Cone argued the cause for respondents. With him on the brief was *William B. Holst.*

Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn and *David L. Rose* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

Two Terms ago in *Free* v. *Bland,* 369 U. S. 663, where federal savings bonds purchased with community funds were registered in a co-ownership form and the registered co-owners were husband and wife, the survivor was held entitled to the proceeds of the bonds without liability to account in any amount to the beneficiaries of the deceased co-owner, despite conflicting state law purporting to forbid a married couple to make survivorship arrangements with respect to community property and requiring such property to pass as part of the estate of the deceased in accordance with his will or the state intestacy laws. The success of the management of the national debt was deemed to depend upon the successful sale of the savings bonds, one of the inducements to purchasers being survivorship provisions which afforded "a convenient method of avoiding complicated probate proceedings." 369 U. S., at 669. State law interfered with a legitimate exercise of federal power and was required to give way under the Supremacy Clause of the Constitution.

The Court nevertheless recognized that the federal law was not to be used as a shield for fraud or to prevent relief "where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property." 369 U. S., at 670. The scope and application of the exception to the regulatory imperative—"the doctrine of fraud applicable under federal law in such a case," 369 U. S., at 670–671—were left to decision in other cases.

This is one of those cases. Petitioner is the brother of Angel Yiatchos who died in 1958 and who in 1950–1951

purchased with community funds belonging to himself and his wife United States Savings Bonds in the face amount of $15,075. The deceased was the registered owner of the bonds and they were made payable on his death to his brother, the petitioner. The deceased left a will made in 1954, naming his wife as executrix and bequeathing all cash and bonds owned by him at the time of his death to his brother, four sisters and a nephew. Petitioner brought suit in the appropriate court in the State of Washington to establish his ownership of the bonds, relying upon the federal regulations providing for registration of the savings bonds in the beneficiary form and providing that in the case of the death of the registered owner "the beneficiary will be recognized as the sole and absolute owner, and payment or reissue will be made as though the bond were registered in his name alone." 31 CFR § 315.66. The trial court, on stipulated facts, sustained the claims of the wife and the other beneficiaries under the will who insisted that since the bonds were purchased with community funds and were community property at the death of the deceased they must be divided into two equal parts, one-half to go to the wife and the other half to be distributed in accordance with the will. The Supreme Court of Washington affirmed, holding that the deceased's "purchase with community funds of bonds payable to him alone or, after his death, payable exclusively to his brother was in fraud of the rights of the respondent wife" and "a void endeavor to divest the wife of any interest in her own property." The deceased having been under a fiduciary duty to manage the community funds for the benefit of the community, "[a] breach of this duty [was] a constructive fraud." Petitioner's claim to any part of the bonds as beneficiary named therein was rejected since "[r]espondent widow had a vested one-half interest in the bond proceeds" and since "[t]he descent of decedent's interest is

controlled by RCW 11.04.050 and, therefore, must be distributed according to the terms of the will." *In re Yiatchos' Estate,* 60 Wash. 2d 179, 182, 373 P. 2d 125, 127. We granted certiorari to consider an asserted conflict with *Free* v. *Bland, supra,* which was decided while this case was on appeal in the Washington Supreme Court and which that court considered in rendering its own judgment.

Under the federal regulations petitioner is entitled to the bonds unless his deceased brother committed fraud or breach of trust tantamount to fraud. Since the construction and application of a federal regulation having the force of law, *California Comm'n* v. *United States,* 355 U. S. 534, 542–545; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484, are involved, whether or not there is fraud which will bar the named beneficiary in a particular case must be determined as a matter of federal law, *Free* v. *Bland, supra; Clearfield Trust Co.* v. *United States,* 318 U. S. 363. But in applying the federal standard we shall be guided by state law insofar as the property interests of the widow created by state law are concerned. It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds.

Proceeding on these premises, we note that under Washington law spouses may agree to change the status of community property either by an agreement to become effective on the death of either spouse, Rev. Code Wash. § 26.16.120; *In re Yiatchos' Estate,* 60 Wash. 2d 179, 182, 373 P. 2d 125, 127, or by gift during lifetime; *Hanley* v. *Most,* 9 Wash. 2d 429, 458, 115 P. 2d 933, 944. Thus the widow in this case could have consented to a gift of community property to her husband's brother or to the inclusion of the bonds in that portion of the estate which belonged to her husband and which he could dispose of

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at the time of his death. If she gave such consent, or if she ratified the purchase and registration of the bonds, the conduct of the husband was not, for federal purposes, fraud or breach of trust sufficient to avoid the command of the regulations, and petitioner would be entitled to all of the bonds.

So far petitioner apparently agrees, but he denies the need for further inquiry, claiming all of the bonds because the record is silent about the knowledge or consent of the wife, she having made no claim of fraud and produced no facts negativing her consent or knowledge. But we think the course suggested by the United States in its *amicus curiae* brief is preferable. The factual record was made by the stipulation of the parties prior to decision of *Free* v. *Bland*, *supra*. Before precluding the widow because of her own conduct, she should have an opportunity upon remand to prove the actual facts concerning her knowledge or participation in the purchase and registration of the bonds.

Petitioner, however, also objects to a remand because further inquiry into consent or acquiescence rests upon the erroneous assumption that the wife could object to the husband's transfer of the bonds after his death. Since the present value of the bonds, or even their face value, is less than one-half the community property, the deceased, says petitioner, was not attempting to give away property belonging to his wife but was only making use of a simple device provided by federal law to dispose of what he could give by will under the Washington law. The validity of this contention turns on a question of state law about which we are not entirely clear and which may be resolved upon remand. According to the court below, the widow had a "vested one-half interest" in the bonds, which may mean that under Washington law the wife before and after death has a half interest in each item of the community estate, including the par-

ticular bonds involved in this case, and cannot be forced to take cash or something else of equal value upon a division of the community property between herself and those entitled to take her husband's half. Under such circumstances, since we cannot say that this property right, if it exists, is insubstantial, to allow all of the bonds to pass to the designated beneficiary would effect an involuntary and impermissible conversion of the widow's assets.

On the other hand, Rev. Code Wash. § 26.16.030 provides that "The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." If under Washington law, the widow, after her husband's death, has no interest in specific assets owned by the community and her half of the community estate may be satisfied from property or money other than the bonds, petitioner is entitled to all of the bonds for then there is no fraud or breach of trust in derogation of the widow's property rights under state law. Upon dissolution of the community one-half of the community property belonged to Angel Yiatchos, who was free, as of the time of dissolution, to dispose of this half as he pleased. He might have left it to his brother by will. Instead he elected to effect the same result by utilizing federal savings bonds with their convenient feature of permitting ownership spanning two lives. On the assumption, then, that the wife is entitled to half of the estate, but not half of each particular item of property, the bonds have not been used as an instrument of fraud; and the survivorship provisions of the federal regulations must control, preempting, if necessary, inconsistent state law which interferes with the legitimate exercise of the Federal Government's power to borrow money. *Free* v. *Bland, supra.*

Petitioner is therefore entitled to all of the bonds if the widow consented to making him the beneficiary or if under Washington law the surviving spouse does not have a one-half interest in each community asset. But even if the wife is not barred by her own consent or by the nature of her interest from claiming a half interest in the bonds, petitioner is entitled to the other half, the half which belonged to the deceased and could be disposed of by him to the beneficiaries of his choice. The Washington court deemed the transaction void *ab initio* and required the deceased's half to pass by his will rather than by virtue of the bonds and the force of the regulation. But the petitioner was entitled to the proceeds only on the death of the husband, and then only if the bonds had not matured or been cashed. During the husband's life he was the registered owner of the bonds, and was therefore entitled at any time to convert them into cash upon presentation and surrender "as though no beneficiary had been named in the registration." 31 CFR § 315.65. Aside from possible consequences of the wife's consent or ratification, as long as Angel Yiatchos was alive the bonds were community property, and could be used by him—the manager of the community and the registered owner of the bonds—for community purposes just as the assets used to purchase them could have been so used. Thus, the holding of the court below, which requires that the bonds be disposed of by will or by state intestacy provisions, is nothing more than a state prohibition against utilizing savings bonds to transmit property at death, and is, for reasons stated above, forbidden by *Free* v. *Bland*, *supra*.

We add but one caveat to our holding that petitioner is entitled to at least one-half the bonds. The bonds, it would appear, are less than one-half the gross estate, but the record does not compare the value of the bonds with one-half the net estate after payment of debts. It is our understanding that the deceased's interest in the com-

munity property is chargeable with his separate debts and with one-half the community debts. *Ryan* v. *Ferguson,* 3 Wash. 356, 28 P. 910. It would not contravene federal law as expressed in the applicable regulations to require the bonds to bear the same share of the debts that they would have borne if they had been passed to petitioner as a specific legacy under the will rather than by the survivorship provisions of the bonds.

The judgment of the Washington court is reversed insofar as it relates to one-half of the bonds, subject to the above remarks concerning the portion of the debts which may be allocable thereto. As to the other half the judgment is vacated and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK, whom MR. JUSTICE DOUGLAS joins, dissenting.

The question to be determined under *Free* v. *Bland,* 369 U. S. 663 (1962), is whether or not the purchase of the bonds by the deceased operated to deprive his surviving wife of her one-half undivided interest in the community property of the spouses. If that purchase operated to deprive her of her one-half interest in the community property, it is tantamount to a constructive fraud upon the community property, and under *Free* v. *Bland, supra,* relief must be granted to the extent of making whole the surviving wife's undivided interest.

It therefore appears to me that the proper order in this case would be to vacate the judgment and remand the case for consideration of the following matters, all of which involve an interpretation of Washington law:

(1) Was the purchase of the bonds and the designation of petitioner as beneficiary an act within the deceased husband's statutory (Wash. Rev. Code

§ 26.16.030) management powers, or did the surviving spouse consent to, or subsequently ratify, the transaction? If either question is answered in the affirmative, the bonds must be delivered to the petitioner. If both questions are answered in the negative, then

(2) What is the amount of the debts, both community and separate, chargeable to the estate? And

(3) Is there sufficient property after the payment of these debts for the surviving wife to receive her one-half undivided interest in the community estate without having to resort to the bonds? If this question is answered in the affirmative, the bonds must be delivered to the petitioner and the surviving wife must receive her one-half undivided interest in the community property from that remaining. If there is not sufficient property in the estate to satisfy the surviving wife's undivided one-half interest from that remainder, then the bonds must be subjected to this deficit, after which the balance of the bonds, if any, would go to the petitioner.

The opinion of the Court conjectures that it might be the law of Washington that a surviving spouse has a one-half interest in each item of the community estate and that if this be so, then allowing all of the bonds to pass to the designated beneficiary would work an involuntary conversion of the spouse's one-half interest in those bonds. The proposition that a spouse has such an interest in each item is of doubtful validity and there is no Washington authority to support it. Further, there is, at the very least, a question of whether such state law, even if it did exist, should be allowed to override the beneficiary designations of the federal bonds. The Court is passing upon this important issue even though it has not been considered by the parties in either their briefs or oral argument.

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE *v.* OREGON STEVEDORING CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 82. Argued January 8, 1964.—Decided March 9, 1964.

1. Shipowner may recover indemnity from a stevedore for breach of implied warranty of workmanlike service where the stevedore, without negligence, has supplied defective equipment which injures its own employee who has recovered a judgment against the shipowner on the basis of unseaworthiness. Pp. 315–325.
2. The effect of a contract provision making stevedore responsible for injuries caused by its negligence on the existence of the implied warranty, not briefed or argued here, is to be determined by the Court of Appeals on remand. P. 325.

310 F. 2d 481, reversed and remanded.

Erskine B. Wood argued the cause for petitioner. With him on the brief was *Erskine Wood.*

Floyd A. Fredrickson argued the cause for respondent. With him on the brief was *Alfred A. Hampson.*

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States, and by *J. Ward O'Neill, Charles B. Howard, Scott H. Elder* and *J. Stewart Harrison* for the American Merchant Marine Institute, Inc., et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

This is an action by a shipowner, Italia Societa per Azioni di Navigazione (Italia), against a contracting stevedore company, Oregon Stevedoring Company (Oregon), to recover indemnity for breach of the stevedore's implied warranty of workmanlike service. The issue presented is whether the warranty is breached where the

stevedore has nonnegligently supplied defective equipment which injures one of its employees during the course of stevedoring operations.

I.

The petitioner, Italia, is the owner of the vessel M. S. *Antonio Pacinotti.* The respondent, Oregon, agreed to render stevedoring services for Italia in all ports along the Columbia and Willamette Rivers. Under the contract between the companies Oregon was to have exclusive rights to and control over the loading and discharge of cargoes aboard Italia's vessels [1] and was to "furnish all necessary labor and supervision and all ordinary gear for the performance of [these] services . . . , including winch drivers and usual appliances used for stevedoring." Italia was to furnish and maintain in safe and efficient working condition suitable booms, winches, blocks, steam, lights and so forth. The agreement provided that the stevedoring company would be responsible for damage to the ship, cargo, and for injury or death of any person caused by its negligence, and that the steamship company would be responsible for the injury or death of any person or damage to property arising from its negligence or by reason of failure of the ship's gear and equipment.[2]

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[1] The contract reads:

"It is mutually agreed between the parties hereto, that the Stevedoring Company will act as stevedores, and that they will with all possible dispatch, load and/or discharge all cargoes of vessels owned, chartered, controlled, or managed by the Steamship Company at all Columbia and Willamette River ports as directed. And it is agreed that the Steamship Company will grant to the said Stevedoring Company the exclusive rights of handling all such cargoes as before mentioned under the terms of this agreement . . . ."

[2] Paragraph VIII of the agreement states:

"The Stevedoring Company will be responsible for damage to the ship and its equipment, and for damage to cargo or loss of cargo over-

During the course of Oregon's stevedoring operations in Portland, one of its longshoreman employees, Griffith, was injured on the M. S. *Antonio Pacinotti* when a tent rope snapped. The rope, permanently attached to a hatch tent used to protect cargo from rain, was furnished by Oregon pursuant to its obligation to supply ordinary gear necessary for the performance of stevedoring services. The injured longshoreman sued the shipowner in a state court for negligence and unseaworthiness [3] and recovered a judgment against Italia upon a general verdict. Italia satisfied the judgment and thereupon brought this suit in a Federal District Court for indemnity from Oregon. The District Court found that the basis for Griffith's recovery was not negligence on the part of the shipowner but a condition of unseaworthiness created by the rope supplied by Oregon, which was found defective and unfit for its intended use. However, the District Court disallowed indemnity because Italia had

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side, and for injury to or death of any person caused by its negligence, provided, however, when such damage occurs to the ship or its equipment, or where such damage or loss occurs to cargo, the ship's officers or other authorized representatives call the same to the attention of the Stevedoring Company at the time of occurrence. The Steamship Company shall be responsible for injury to or death of any person or for any damage to or loss of property arising through the negligence of the Steamship Company or any of its agents or employees, or by reason of the failure of ship's gear and/or equipment."

[3] The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended and this liability extends to longshoremen and others who work aboard the vessel, including those in the employ of contracting stevedore companies. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *Mitchell* v. *Trawler Racer*, 362 U. S. 539. If the owner engages others who supply the equipment necessary for stevedoring operations, he must still answer to the longshoreman if the gear proves to be unseaworthy. *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396. This liability is strict and nondelegable. *Mitchell* v. *Trawler Racer, supra; Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

failed to prove negligence on the part of the stevedore company, since the defective condition of the rope was not apparent. That court viewed the contractual provision rendering Oregon liable for injuries caused by its negligence as an express disclaimer against an implied warranty of workmanlike service. The Court of Appeals for the Ninth Circuit with one judge dissenting, affirmed, but solely on the ground that a stevedore's implied warranty of workmanlike service is not breached in the absence of a showing of negligence in supplying defective equipment. 310 F. 2d 481. Because of a conflict between this decision and the decision of the Court of Appeals for the Second Circuit in *Booth S. S. Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310, and the importance of the question involved, we granted certiorari. 372 U. S. 963. For the reasons stated below, we have determined that the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based on the stevedore's implied warranty of workmanlike service.

In *Ryan* v. *Pan-Atlantic Corp.*, 350 U. S. 124, the landmark decision in this area, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's improper stowage of cargo. Although the agreement between the shipowner and stevedore was silent on the subject of warranties and standards of performance, the Court found that the essence of the stevedore's contract is to perform "properly and safely." "Competency and safety . . . are inescapable elements of the service undertaken." This undertaking is the stevedore's "warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product," 350 U. S., at 133–134, a warranty generally deemed to cover defects not attributable to a manufac-

turer's negligence.[4] See also *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428–429.

The Court further distinguished in *Ryan* between contract and tort actions, stating that the shipowner's suit for indemnification was not changed "from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service," 350 U. S., at 134, and pointedly declined to characterize the stevedore's conduct as negligent, notwithstanding that discussion in the opinion below centered on concepts of active and passive negligence on the part of the shipowner and stevedore.[5] Although in *Ryan* the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike.

Subsequent decisions have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo

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[4] *George* v. *Willman*, 379 P. 2d 103 (Alaska); *Hessler* v. *Hillwood Mfg. Co.*, 302 F. 2d 61 (C. A. 6th Cir.); *Green* v. *American Tobacco Co.*, 154 So. 2d 169 (Fla.); *Henningsen* v. *Bloomfield Motors*, 32 N. J. 358, 161 A. 2d 69. See Frumer and Friedman, Products Liability, § 10.01, and cases cited therein; Uniform Sales Act, Uniform Laws Annotated (1950 ed.), § 15 (1); Uniform Commercial Code, Uniform Laws Annotated (1962 ed.), § 2–315. See generally Williston, Sales, § 237 (Rev. ed. 1948 and Supp. 1963).

[5] *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277 (C. A. 2d Cir.):

"Judgment on the action for indemnity over was awarded to Ryan. We think this error. The trial judge found Pan-Atlantic guilty of negligence in that its 'cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel.' However, Ryan created the hazardous condition by its improper stowage of the pulp paper rolls at Georgetown. We think the improper stowage the primary and active cause of the accident. Under our holdings . . . indemnity over is recoverable where, as here, the employer's negligence was the 'sole' 'active' or 'primary' cause of the accident." *Id.*, at 279.

but also to the use of equipment incidental thereto, *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, including defective equipment supplied by the shipowner, *Crumady* v. *The J. H. Fisser, supra,* cf. *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421, and that the shipowner's negligence is not fatal to recovery against the stevedore. "[I]n the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." *Weyerhaeuser, supra,* at 569. And last Term in *Reed* v. *The Yaka,* 373 U. S. 410, we assumed, without deciding, that a shipowner could recover over from a stevedore for breach of warranty even though the injury-causing defect was latent and the stevedore without fault. We think that the stevedore's implied warranty of workmanlike performance applied in these cases is sufficiently broad to include the respondent's failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct.[6]

Oregon argues, however, that the imposition in *Ryan* of liability on the stevedore in warranty rather than tort was necessitated by the Court's previous decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, which held that maritime principles of contribution between joint tortfeasors prevailing in collision cases were not applicable in suits for contribution by a shipowner against stevedore companies. It further

[6] If the stevedore is liable in warranty for supplying defective, injury-producing equipment, of course the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901–950, are no bar to recovery. This question was fully resolved in *Ryan* v. *Pan-Atlantic Corp., supra,* at 130: "The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless." See also *Reed* v. *The Yaka, supra.*

urges that negligence on the part of the stevedore company or its employees was present in all the above cases, and that the Court characterized the warranty in post-*Ryan* decisions as one entailing an obligation to perform with reasonable safety and reasonable competency. However, the stevedore's obligation established in *Ryan* was not merely an escape from the no-recovery consequences of *Halcyon,* as is evidenced by the fact that recovery of contribution between joint tortfeasors and recovery of indemnity for breach of warranty proceed on two wholly distinct theories and produce disparate results.[7] See *American Stevedores* v. *Porello,* 330 U. S. 446. Recovery in contribution is imposed by law and is measured by the relative fault of the joint tortfeasors or shared equally between them, *The North Star,* 106 U. S. 17; *The Max Morris,* 137 U. S. 1; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp., supra;* while recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary. *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co., supra.* And the description of the stevedore's obligation as one of performance with reasonable safety is not a reference to the reasonable-man test pertaining to negligence, but a delineation of the scope of the stevedore's implied contractual duties. The implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment;[8] however, the

[7] See *Crawford* v. *Pope & Talbot, Inc.,* 206 F. 2d 784 (C. A. 3d Cir.); *Rich* v. *United States,* 177 F. 2d 688 (C. A. 2d Cir.); *McFall* v. *Compagnie Maritime Belge, S. A.,* 304 N. Y. 314, 107 N. E. 2d 463. See generally Weinstock, The Employer's Duty to Indemnify Shipowners For Damages Recovered By Harbor Workers, 103 U. of Pa. L. Rev. 321 (1954).

[8] Cf. *Calderola* v. *Cunard S. S. Co.,* 279 F. 2d 475 (C. A. 2d Cir.); *Orlando* v. *Prudential S. S. Corp.,* 313 F. 2d 822 (C. A. 2d Cir.).

issue of breach of the undertaking does not turn on whether the contractor knew or should have known that his equipment was safe, but on whether the equipment was in fact safe and fit for its intended use. As the Court has aptly said with respect to the shipowner's duty to furnish a seaworthy vessel, a duty which is imposed by law:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550.

We do not believe a rope designed to withstand three to five times the pressure exerted on it when it gave way satisfies the standard of reasonable safety. And the District Court specifically found that the rope was unfit for the purpose for which it was intended and that the injury to Griffith was the natural consequence of its breakage.

Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the ship-

owner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unloading and loading portion of the ship's work, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, cf. *Pope & Talbot* v. *Hawn*, 346 U. S. 406, they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company.[9]

True the defect here was latent and the stevedore free of negligent conduct in supplying the rope. But latent defects may be attributable to improper manufacture or fatigue due to long use and may be discoverable by subjecting the equipment to appropriate tests. Further the stevedore company which brings its gear on board knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations. See *Booth S. S. Co.* v. *Meier & Oelhaf Co., supra.* It is considerations such as these that underlie a manufacturer's or seller's obligation to supply products free of defects and a shipowner's obligation to furnish a seaworthy vessel.[10] They also serve to render a tort standard of negli-

[9] *Seas Shipping Co.* v. *Sieracki, supra,* at 100. *Hugev* v. *Dampskisaktieselskabet Int'l,* 170 F. Supp. 601, 609–611, aff'd *sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet Int'l,* 274 F. 2d 875 (C. A. 9th Cir.), cert. denied, 363 U. S. 803; *Revel* v. *American Export Lines,* 162 F. Supp. 279, 286–287, aff'd, 266 F. 2d 82 (C. A. 4th Cir.).

[10] "The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved." *DeGioia* v. *United States Lines,* 304 F. 2d 421, 426 (C. A. 2d Cir.). And see *Ferrigno* v. *Ocean Transport Ltd.,* 309 F. 2d 445 (C. A. 2d Cir.).

gence inapplicable to the stevedore's liability under its warranty of workmanlike service. For they illustrate that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. See *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, 401 (dissenting opinion).

Both sides press upon us their interpretation of the law in regard to the scope of warranties in nonsales contracts, such as contracts of bailment and service agreements. But we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, *American Stevedores, Inc.,* v. *Porello, supra,* in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, *Reed* v. *The Yaka,* 373 U. S. 410, 414, we think our decision today is in furtherance of these objectives.

II.

The District Court declined to pass on the issue decided above since it found that the implied warranty of workmanlike performance was negated by the provision in

the agreement rendering Oregon liable for personal injuries resulting from its negligence. The Court of Appeals declined to pass on the latter question, its finding that the warranty did not extend to nonnegligent conduct rendering a resolution of it unnecessary. The effect of the express assumption of liability for negligence provision in the contract on the existence of the implied warranty has not been briefed or argued in this Court. Accordingly, the issue remains for the Court of Appeals to decide. The judgment below is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

Today's decision is commanded neither by *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, and its progeny, nor by the general law of warranty. In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, and *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act[1] as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer. *Ryan* held no more than that the shipowner could recover over from the stevedoring company, by invoking the legal formula of warranty, where there had been a finding that the stevedoring company had been negligent.[2] In the present case there is

[1] 44 Stat. 1424, as amended, 33 U. S. C. §§ 901–950.

[2] *Reed* v. *The Yaka*, 373 U. S. 410, held only that a longshoreman could bring a suit for unseaworthiness against a stevedoring company which chartered a ship and was the longshoreman's employer. In that case no issue as to an implied warranty of workmanlike service

an express finding that the stevedoring company was not negligent.

Moreover, the Court here expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of the law as well as in admiralty. There is no basis in past decisions of this or any other court for the holding that one who undertakes to do a job for another and is not negligent in any respect nevertheless has an insurer's absolute liability to indemnify for liability to injured workers which the party who hired the job done may incur.

Finally, the contract under which the parties dealt here provided that the stevedoring company was to be liable for personal injuries resulting from its negligence, while the shipowner was to be liable for injury caused by its own negligence "or by reason of the failure of ship's gear and/or equipment." This provision appears on its face to put the burden of liability for unseaworthiness, which was the basis of the worker's recovery here, on the shipowner, leaving negligence as the only basis on which the stevedoring company could be held liable. The District Court so held. The contract is before us, and we are as competent to interpret it now, without remanding to the Court of Appeals, as we are to invoke "policy" reasons in order to expand *Ryan* and impose new financial burdens on stevedoring companies in plain violation of the policy Congress adopted in the Longshoremen's and Harbor Workers' Compensation Act.

For these and other reasons cogently expressed in Judge Hamlin's opinion for the Court of Appeals, 310 F. 2d 481, I dissent.

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arose because the stevedoring company had agreed in any case to hold the shipowner harmless without regard to negligence, see 183 F. Supp. 69, 70; furthermore, the stevedoring company there was also the operator of the vessel, and therefore in that particular case was primarily liable for unseaworthiness.

UNITED STATES *v.* WARD BAKING CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

No. 101. Argued February 18, 1964.—Decided March 9, 1964.

District Court may not enter a "consent" judgment in a civil antitrust case where the Government, seeking relief to which it may be entitled after trial, does not agree to the terms of such judgment. Pp. 327–335.

Vacated and remanded.

Assistant Attorney General Orrick argued the cause for the United States. With him on the brief were *Solicitor General Cox, Philip B. Heymann* and *Lionel Kestenbaum.*

Davisson F. Dunlap argued the cause for appellees. With him on the brief were *John W. Ball, Charles L. Gowen, John B. Miller* and *John H. Boman, Jr.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This appeal raises the question of whether and under what circumstances a District Court may properly enter a "consent" judgment in a civil antitrust suit without the consent of the Government and without trial of certain disputed issues.

On July 21, 1961, the Government filed a civil complaint [1] in the United States District Court for the Middle

[1] In March 1961 an indictment had been returned against the five bakery companies charging them with violating the Sherman Act by committing substantially the same acts as were charged in the subsequent civil complaint. Four of appellee companies, and two other companies, had also been charged with conspiring to fix the price of bread and rolls on sales to nongovernment wholesale accounts, defined as "grocery stores, supermarkets, restaurants, hotels and similar large purchasers . . . ." All the defendants submitted, over

District of Florida. The complaint charged the five appellee bakery companies with violating § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1,[2] by conspiring:

> "(a) To allocate among themselves the business of supplying bakery products [defined as bread and rolls] to the United States Naval installations in the Jacksonville area; and
>
> "(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area."

The Government sought relief, including an adjudication that the companies had violated the Act, an injunction against allocating business or fixing prices in the supplying of bakery products to United States naval installations in the Jacksonville area, and "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises."

On May 8, 1962, after an extensive period of settlement negotiations, the bakery companies filed with the court a proposed form of judgment which would have enjoined the companies from conspiring to:

> "(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying bakery products *to United States Naval installations in the Jacksonville area,* or

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the objection of the Government, pleas of *nolo contendere* and fines were imposed. The same judge presided in both the criminal and civil cases.

[2] The companies were also charged with violating the False Claims Act, Revised Statutes §§ 3490, 3491, 3492, 5438, as amended, 31 U. S. C. §§ 231–233, derived from the Act of March 2, 1863, 12 Stat. 696. This was settled by a payment of $44,000.

> "(b) Allocate, divide or rotate the business of supplying bakery products to *United States Naval installations in the Jacksonville area.*" (Emphasis added.)

The proposed judgment would also have required the companies to include sworn statements of noncollusion in each bid for bakery products submitted to any naval installations in the Jacksonville area for the following *three* years.

The District Court ordered the Government to show cause "why the said proposed judgment . . . should not be entered." The Government replied, objecting "to confining the scope of the injunction to bids for supplying bread and rolls to United States Naval Installations in the Jacksonville area" and "to limiting the requirement . . . that bids be accompanied by sworn statements of non-collusion, to a three year period."

The bakery companies then filed an amended motion for entry of consent judgment, containing two significant changes in their original proposal. Its scope was broadened to include all bakery products, not only bread and rolls, and to include all sales to the United States, not only to its naval installations in the Jacksonville area. Subsequently, at the hearing on the order to show cause, the companies agreed to increase, from three to five years, the period during which they were to submit sworn statements of noncollusion.

The Government opposed entry of the amended proposed consent judgment on the ground that it still omitted two necessary items of relief:

> "(1) a general injunction against conspiring to fix the price of bakery products to any third party other than the Government, and (2) an injunction against urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products."

Despite these objections, the District Court entered the amended "consent" judgment proposed by the companies. The judgment recited that it was entered "without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony . . . ." In his opinion accompanying the entry of judgment, the district judge said:

> "The demand of the plaintiff as to the inclusion of the two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. . . . Based upon this court's knowledge of the facts involved in Case No. 11677–Crim–J and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint. . . . The mere fact that a court has found a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

The Government, pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, appealed directly to this Court from the entry of judgment. Probable jurisdiction was noted. 374 U. S. 803. We conclude that the additional relief sought by the Government had a reasonable basis under the circumstances and that, consequently, the District Court erred in entering the "consent" judgment without the Government's actual consent.

This Court has recognized that a "full exploration of facts is usually necessary in order [for the District Court]

properly to draw [an antitrust] decree" so as "to prevent future violations and eradicate existing evils." *Associated Press* v. *United States,* 326 U. S. 1, 22. After a District Court has concluded that a conspiracy in restraint of trade exists, it:

> "has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct. . . . [R]elief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 88–89, 90.

It would be a rare case where all the facts necessary for a trial court to decide whether a disputed item of relief was warranted could be determined without an "opportunity to know the record." *Id.,* at 89. This is not such a case.

The dispute here concerned whether the injunction should include prohibitions against (1) price fixing in sales to parties other than the United States Government, and (2) "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products."

The conspiracy alleged in the complaint was a particularly flagrant one. The complaint charged specifically that:

> "Representatives of the defendants held meetings and conferred by telephone for the purpose of allo-

> cating among the defendants the business of supplying bakery products to United States Naval installations in the Jacksonville area. The business was allocated in such a manner as to provide each defendant with the business for a designated quarterly period of the year. When invitations to bid were received from the Naval installations in the Jacksonville area, said representatives would again meet and confer and the representatives of the defendant designated for the particular period would declare the prices which that defendant intended to bid. The others would agree to bid higher prices and thus protect the bid of the designated low bidder."

As this Court has said: "Acts in disregard of law call for repression by sterner measures than where the steps could reasonably have been thought permissible." 340 U. S., at 89–90. The acts here alleged could not, under any theory, have been thought permissible. "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 436.

The allegedly illegal acts were surrounded by "circumstances," *United States* v. *United States Gypsum Co., supra,* at 89, which did not preclude the possibility that the relief sought by the Government would be warranted. In fact, the circumstances tended to support the view that the practices which the Government sought to enjoin were "connected" with and "related" to practices which the companies may in the past have followed. The Government informed the District Court that "on June 27, 1962, a federal grand jury in Philadelphia indicted the defendant Ward Baking Company on a charge of conspiring with five other baking companies to fix the prices of 'economy' bread sold in the Philadelphia-Trenton

area." The record before the District Court showed, moreover, that four of the defendants had previously pleaded *nolo contendere* to charges of conspiring to fix prices on sales to *nongovernment* accounts, such as "grocery stores, supermarkets, restaurants, hotels and similar large purchasers." Thus, the surrounding circumstances suggest the possibility of a conspiracy reaching beyond the Jacksonville area, beyond bread and rolls, and, most significantly, beyond sales to the Government.

Against this background, it cannot reasonably be assumed that the Government could not, at the trial, have introduced evidence justifying, in whole or in part, the relief sought.[3] This is not to say, of course, that the District Court could not correctly have concluded, after trial and an "opportunity to know the record and to appraise the need for prohibitions or affirmative actions," *United States* v. *United States Gypsum Co., supra,* at 89, that the requested relief was not warranted. Under the circumstances of this case, however, it could not so conclude without a trial.[4]

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[3] The disputed provisions certainly may be regarded as within the general scope of the relief sought in the complaint, which included a request for "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises." It should be noted in this regard that the companies did accede to a number of government demands which went beyond the violations charged or the specific relief requested.

[4] It is not contended that this would have been a proper case for the entry of summary judgment. The critical question was whether the Government could produce evidence at trial warranting the relief sought. The companies claim, however, that if the Government had such evidence, it should have produced that evidence in response to the District Court's order to show cause why the companies' proposed consent judgment should not be entered. The show-cause order cannot properly be read as a demand that the Government detail or tender the evidence it proposed to offer at trial. The Government's response, which specified its legal and factual objec-

Since we conclude that there was a bona fide disagreement concerning substantive items of relief which could be resolved only by trial, we need not, and do not, reach appellees' contention that, where there is agreement on every substantive item of relief, insistence by the Government upon an adjudication of guilt as a condition to giving its consent to a judgment would conflict with the congressional policy embodied in § 5 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 16.[5] Compare, *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657. We decide only that where the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the District Court may not enter a "consent" judgment without the actual consent of the Government. There is nothing in the language or legislative history of § 5 of the Clayton Act indicating that Congress intended to give a defendant the privilege of rejecting the bona fide demands of the Government and at the same time avoiding an adjudication on the merits of the complaint. The companies argued before the District Court that they should not be "foreclosed from a

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tions to the entry of the proposed decree and informed the court of the Philadelphia-Trenton indictment, *ante*, at 332–333, was a full and satisfactory response to the show-cause order.

[5] The Clayton Act, § 5 (a), 38 Stat. 731, as amended, 15 U. S. C. § 16, provides as follows:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

right to go to trial if [the District Court decides] to enter the Government's Decree." Nor should the Government be foreclosed from that same right where, as here, the District Court decides, over the Government's objection, to enter the companies' proposed decree.

Accordingly, the judgment is vacated and the case is remanded for trial.

It is so ordered.

ARCENEAUX *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 76. Argued January 15, 1964.—Decided March 9, 1964.

Writ of certiorari dismissed for lack of jurisdiction since denial of preliminary hearing in this case is not a "final" judgment under 28 U. S. C. § 1257.

J. Minos Simon argued the cause and filed briefs for petitioner.

Bertrand De Blanc argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion*, Attorney General of Louisiana, and *M. E. Culligan*, Assistant Attorney General.

PER CURIAM.

Petitioner, who was before the state court "on a charge of vagrancy," [1] raised several objections to a denial of a preliminary hearing. The third of these reads as follows:

> ". . . that the bill of information charges no offense known to law and if it charges an offense within the meaning and intentment [*sic*] of a Louisiana statute, then both the statute and the bill of information are unconstitutional, null, and void, as being violative of the guaranties contained in the United States Constitution and of the Louisiana Constitution and Laws; . . ."

Louisiana Rev. Stat. § 15:154 provides that "after an indictment found or an information filed, it shall be

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[1] The statute challenged, La. Rev. Stat. § 14:107 (1962 Cum. Supp.), provides:

"The following persons are and shall be guilty of vagrancy:

. . . .

"(8) Persons found in or near any structure, movable, vessel, or private grounds, without being able to account for their lawful presence therein; . . . ."

wholly within the discretion of the district court, and not subject to review by any other court, to order or to refuse to order a preliminary examination; . . ."

Petitioner, when he asked for a preliminary hearing, was incarcerated and charged by affidavit with the offense of vagrancy. Neither an indictment nor a bill of information had been filed against him. In that state of the proceedings the motion for a preliminary examination was granted and a hearing set for March 8, 1962, and then continued to March 9. On March 9 the District Attorney filed an information charging the accused with the crime of vagrancy. Thereupon, the district judge recalled his order for a preliminary examination.

Petitioner appealed to the Louisiana Supreme Court, asking for a writ of habeas corpus and alternatively for certiorari, mandamus, and prohibition. In that application the remedies of certiorari,[2] mandamus and prohibition were sought alternatively for denial of a preliminary examination and for having to stand trial under the Vagrancy Act.

In that application the petitioner said:

> "The bill of information charged no criminal offense, and if it did set forth an alleged offense in the language of a statute, then such statute and the bill of information are unconstitutional, null and void, being violative of both Federal and State Constitutions."

In the prayer for relief contained in the application he asked in the alternative that the Court rule "upon the constitutionality" of the vagrancy statute and whether it and other Louisiana statutes and constitutional provisions cited "are contrary to and violative of the provisions

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[2] We do not concern ourselves with the state law aspects of habeas corpus, which is, after all, only an alternative form of relief that was sought.

of the United States Constitution, and in particular the Fifth, Sixth and Fourteenth Amendments thereto."

Thus when petitioner sought review of the denial of a preliminary hearing, he tried to raise the question of the constitutionality of the vagrancy statute.

The Supreme Court denied the writs on March 16, 1962, saying "Writ refused. There is no error of law in the ruling complained of." The petition for certiorari to this Court was filed March 31, 1962. Two months later, *i. e.*, May 31, 1962, petitioner appeared in the Lafayette city court (to which the case had been transferred by the District Court) and pleaded guilty to the charge of vagrancy. He was then sentenced to serve four months in jail, but given credit for the time served and forthwith discharged. We granted certiorari, 372 U. S. 906, and the case has been argued.

In Louisiana it seems that, with exceptions not relevant here, only orders which finally dispose of criminal cases can be appealed. See La. Rev. Stat. §15:540. "A case is finally disposed of by any judgment which dismisses the prosecution, whether before or after verdict, that grants or refuses to grant a new trial, that arrests or refuses to arrest judgment, or that imposes sentence." La. Rev. Stat. § 15:541.

The "ruling complained of" as referred to by the Louisiana Supreme Court can only be the order recalling the order for a preliminary hearing. Under our decisions in the criminal field, such denial of intermediate relief in state criminal cases is similar to an order overruling a plea in bar (*Eastman* v. *Ohio*, 299 U. S. 505) or overruling a demurrer to an indictment (*Polakow's Realty Experts* v. *Alabama*, 319 U. S. 750). Hence under 28 U. S. C. § 1257, denial of the preliminary hearing in a vagrancy case of this character is not a "final" judgment. We therefore dismiss the writ for lack of jurisdiction, without any intimation as to what rights, if any, petitioner may have under the Civil Rights Acts.

SHUTTLESWORTH *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 168. Argued February 27, 1964.—Decided March 9, 1964.

42 Ala. App. 1, 149 So. 2d 921, reversed.

Jack Greenberg argued the cause for petitioner. With him on the brief were *James M. Nabrit III*, *Peter A. Hall* and *Orzell Billingsley, Jr.*

J. M. Breckenridge argued the cause and filed a brief for respondent.

PER CURIAM.

The judgment of the Court of Appeals of Alabama is reversed. *Cole* v. *Arkansas*, 333 U. S. 196; *Williams* v. *Georgia*, 349 U. S. 375.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

ARIZONA *v.* CALIFORNIA ET AL.

No. 8, Original. Decided June 3, 1963.—Decree entered March 9, 1964.

Decree carrying into effect this Court's opinion of June 3, 1963, 373 U. S. 546.

IT IS ORDERED, ADJUDGED AND DECREED THAT

I. For purposes of this decree:

(A) "Consumptive use" means diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation;

(B) "Mainstream" means the mainstream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon;

(C) Consumptive use from the mainstream within a State shall include all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping, and including, but not limited to, consumptive uses made by persons, by agencies of that State, and by the United States for the benefit of Indian reservations and other federal establishments within the State;

(D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;

(E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States;

(F) "Tributaries" means all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry;

(G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;

(H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;

(I) "Domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power;

(J) "Annual" and "Year," except where the context may otherwise require, refer to calendar years;

(K) Consumptive use of water diverted in one State for consumptive use in another State shall be treated as if diverted in the State for whose benefit it is consumed.

II. The United States, its officers, attorneys, agents and employees be and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

(1) For river regulation, improvement of navigation, and flood control;

(2) For irrigation and domestic uses, including the satisfaction of present perfected rights; and

(3) For power;

Provided, however, that the United States may release water in satisfaction of its obligations to the United

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States of Mexico under the Treaty dated February 3, 1944, without regard to the priorities specified in this subdivision (A);

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

(1) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three States, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;

(2) If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid States in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

(3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be

apportioned for use in California including all present perfected rights;

(4) Any mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released;

(5) Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

(6) If, in any one year, water apportioned for consumptive use in a State will not be consumed in that State, whether for the reason that delivery contracts for the full amount of the State's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other States. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(C) From applying the provisions of Article 7 (d) of the Arizona water delivery contract dated February 9, 1944, and the provisions of Article 5 (a) of the Nevada water delivery contract dated March 30, 1942, as amended by the contract dated January 3, 1944, to reduce the apportionment or delivery of mainstream water to users within the States of Arizona and Nevada by reason of any uses in such States from the tributaries flowing therein;

(D) From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment

named in this subdivision (D) except in accordance with the allocations made herein; provided, however, that such release may be made notwithstanding the provisions of Paragraph (5) of subdivision (B) of this Article; and provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

(3) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream

water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp Land Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292), shall not be included as irrigable acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre-feet per acre of such land that is irrigable; provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined;

(6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the pur-

poses of the Recreation Area, with priority dates of May 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(7) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge, not to exceed (i) 41,839 acre-feet of water diverted from the mainstream or (ii) 37,339 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941, for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559);

(8) The Imperial National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge not to exceed (i) 28,000 acre-feet of water diverted from the mainstream or (ii) 23,000 acre-feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of February 14, 1941;

(9) Boulder City, Nevada, as authorized by the Act of September 2, 1958, 72 Stat. 1726, with a priority date of May 15, 1931;

Provided, further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each State wherein such uses occur and subject to, in the case of each reservation, such rights as have been created prior to the establishment of such reservation by contracts executed under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

III. The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metro-

politan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, and all other users of water from the mainstream in said States, their officers, attorneys, agents and employees, be and they are hereby severally enjoined:

(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

(B) From interfering with or purporting to authorize the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

(C) From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective States; provided, however, that no party named in this Article and no other user of water in said States shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;

(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree.

IV. The State of New Mexico, its officers, attorneys, agents and employees, be and they are after four years from the date of this decree hereby severally enjoined:

(A) From diverting or permitting the diversion of water from San Simon Creek, its tributaries and underground water sources for the irrigation of more than a total of 2,900 acres during any one year, and from exceeding a total consumptive use of such water, for whatever purpose, of 72,000 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 8,220 acre-feet during any one year;

(B) From diverting or permitting the diversion of water from the San Francisco River, its tributaries and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Luna Area	225
Apache Creek-Aragon Area	316
Reserve Area	725
Glenwood Area	1,003

and from exceeding a total consumptive use of such water for whatever purpose, of 31,870 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 4,112 acre-feet during any one year;

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries) and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

Upper Gila Area	287
Cliff-Gila and Buckhorn-Duck Creek Area	5,314
Red Rock Area	1,456

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre-feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in

United States v. *Gila Valley Irrigation District et al.* (Globe Equity No. 59) (herein referred to as the Gila Decree), and except pursuant to and in accordance with the terms and provisions of the Gila Decree; provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:

Owner	Subdivision and Legal Description	Sec.	Twp.	Rng.	Acreage
Marvin Arnett and J. C. O'Dell.	Part Lot 3	6	19S	21W	33.84
	Part Lot 4	6	19S	21W	52.33
	NW¼SW¼	5	19S	21W	38.36
	SW¼SW¼	5	19S	21W	39.80
	Part Lot 1	7	19S	21W	50.68
	NW¼NW¼	8	19S	21W	38.03
Hyrum M. Pace, Ray Richardson, Harry Day and N. O. Pace, Est.	SW¼NE¼	12	19S	21W	8.00
	SW¼NE¼	12	19S	21W	15.00
	SE¼NE¼	12	19S	21W	7.00
C. C. Martin	S. part SE¼SW¼SE¼	1	19S	21W	0.93
	W½W½W½NE¼NE¼	12	19S	21W	0.51
	NW¼NE¼	12	19S	21W	18.01
A. E. Jacobson	SW part Lot 1	6	19S	21W	11.58
W. LeRoss Jones	E. Central part: E½E½E½ NW¼NW¼.	12	19S	21W	0.70
	SW part NE¼NW¼	12	19S	21W	8.93
	N. Central part: N½N½NW¼ SE¼NW¼.	12	19S	21W	0.51
Conrad and James R. Donaldson.	N½N½N½SE¼	18	19S	20W	8.00
James D. Freestone	Part W½NW¼	33	18S	21W	7.79
Virgil W. Jones	N½SE¼NW¼; SE¼NE¼ NW¼.	12	19S	21W	7.40
Darrell Brooks	SE¼SW¼	32	18S	21W	6.15
Floyd Jones	Part N½SE¼NE¼	13	19S	21W	4.00
	Part NW¼SW¼NW¼	18	19S	20W	1.70
L. M. Hatch	SW¼SW¼	32	18S	21W	4.40
	Virden Townsite				3.90
Carl M. Donaldson	SW¼SE¼	12	19S	21W	3.40
Mack Johnson	Part NW¼NW¼NE¼	10	19S	21W	2.80
	Part NE¼NW¼NE¼	10	19S	21W	0.30
	Part N½N½S½NW¼NE¼	10	19S	21W	0.10
Chris Dotz	SE¼SE¼; SW¼SE¼	3	19S	21W	2.66
	NW¼NE¼; NE¼NE¼	10	19S	21W	
Roy A. Johnson	NE¼SE¼SE¼	4	19S	21W	1.00
Ivan and Antone Thygerson	NE¼SE¼SE¼	32	18S	21W	1.00
John W. Bonine	SW¼SE¼SW¼	34	18S	21W	1.00
Marion K. Mortenson	SW¼SW¼SE¼	33	18S	21W	1.00
Total					380.81

or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre-feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree; and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the Gila Decree, or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre-feet per annum in addition to the uses confirmed by the Gila Decree, unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree;

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water users in the State of New Mexico; nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used;

(F) Provided, further, that no diversion from a stream authorized in Article IV (A) through (D) may be transferred to any of the other streams, nor may any use for irrigation purposes within any area on one of the streams be transferred for use for irrigation purposes to any other area on that stream.

V. The United States shall prepare and maintain, or provide for the preparation and maintenance of, and shall make available, annually and at such shorter intervals as the Secretary of the Interior shall deem necessary or advisable, for inspection by interested persons at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) Releases of water through regulatory structures controlled by the United States;

(B) Diversions of water from the mainstream, return flow of such water to the stream as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation, and consumptive use of such water. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(C) Releases of mainstream water pursuant to orders therefor but not diverted by the party ordering the same, and the quantity of such water delivered to Mexico in satisfaction of the Mexican Treaty or diverted by others in satisfaction of rights decreed herein. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(D) Deliveries to Mexico of water in satisfaction of the obligations of Part III of the Treaty of February 3, 1944, and, separately stated, water passing to Mexico in excess of treaty requirements;

(E) Diversions of water from the mainstream of the Gila and San Francisco Rivers and the consumptive use of such water, for the benefit of the Gila National Forest.

VI. Within two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each State,

respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

VII. The State of New Mexico shall, within four years from the date of this decree, prepare and maintain, or provide for the preparation and maintenance of, and shall annually thereafter make available for inspection at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) The acreages of all lands in New Mexico irrigated each year from the Gila River, the San Francisco River, San Simon Creek, and their tributaries and all of their underground water sources, stated by legal description and component acreages and separately as to each of the areas designated in Article IV of this decree and as to each of the three streams;

(B) Annual diversions and consumptive uses of water in New Mexico, from the Gila River, the San Francisco River, San Simon Creek, and their tributaries and all their underground water sources, stated separately as to each of the three streams.

VIII. This decree shall not affect:

(A) The relative rights *inter sese* of water users within any one of the States, except as otherwise specifically provided herein;

(B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico and Utah except the Gila River System;

(C) The rights or priorities, except as specific provision is made herein, of any Indian Reservation, National Forest, Park, Recreation Area, Monument or Memorial, or other lands of the United States;

(D) Any issue of interpretation of the Colorado River Compact.

IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent to the extent that the decree conflicts with the views expressed in the dissenting opinion of MR. JUSTICE HARLAN, 373 U. S. 546, 603.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

SMITH *v.* PENNSYLVANIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 561. Decided March 9, 1964.

Certiorari granted and case remanded for reconsideration of petitioner's requests for statements of witnesses.

Reported below: 412 Pa. 1, 192 A. 2d 671.

William T. Coleman, Jr. for petitioner.

Frank P. Lawley, Deputy Attorney General of Pennsylvania, for respondent.

Solicitor General Cox filed a memorandum for the United States.

Melvin L. Wulf for the American Civil Liberties Union, Greater Philadelphia Branch, et al., as *amici curiae,* in support of the petition.

PER CURIAM.

Prior to commencement of petitioner's trial for assault and battery upon state police officers, he served upon the local office of the Federal Bureau of Investigation a subpoena *duces tecum* calling for the production of "[s]tatements of all witnesses, diagrams, sketches and photographs taken in connection with" the FBI's investigation of the incident which formed the basis for the criminal prosecution. The FBI had made the investigation in response to a complaint filed by petitioner with the Civil Rights Division of the Department of Justice, charging a deprivation of his civil rights by the actions of the police officers whom he allegedly assaulted. An Assistant United States Attorney appeared on the day set for trial and moved to quash the subpoena, claiming that the file contained confidential material subject to a federal priv-

ilege of nondisclosure. The subpoena was quashed by the trial court for that reason and for noncompliance with local rules of practice.

Petitioner formally requested the court, both before and after they testified, to issue a subpoena *duces tecum* for statements taken by the FBI from two witnesses for the prosecution, stating that the statements were needed for purposes of impeachment. The trial court denied the requests because it felt that petitioner would receive the same information from material which the state authorities had promised to make available. Following petitioner's conviction, the trial court denied his motion for a new trial which was based in part on the failure to issue the requested subpoena, stating that the Federal Government had already indicated that it would not honor such a subpoena. The judgment of conviction was affirmed by the Pennsylvania Supreme Court (412 Pa. 1, 192 A. 2d 671), the court stating, *inter alia*, that the FBI, not the Commonwealth, had denied petitioner access to the information in question.

In response to an inquiry from this Court, the Solicitor General has indicated that the claim of confidential privilege was concerned solely with the initial broad-based demand for virtually the entire FBI file on the matter and that the Department of Justice was not informed of, and did not refuse to comply with, the subsequent specific requests for statements given by the two witnesses.

We grant the petition for a writ of certiorari and remand the case to the Supreme Court of Pennsylvania, for reconsideration of petitioner's requests in light of the representations of the Solicitor General.

MICHAELS ENTERPRISES, INC., ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 571. Decided March 9, 1964.

Certiorari granted, judgment vacated, and case remanded for consideration by the Court of Appeals of the sufficiency of the evidence to support imposition of nonconcurrent sentences, that court having erroneously assumed that petitioners had not made a motion for acquittal at the close of the evidence.

Reported below: 321 F. 2d 913.

Morris A. Shenker and *Murry L. Randall* for petitioners.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

Petitioner James A. Michaels, Jr., is president of petitioner Michaels Enterprises, Inc., a corporate retail dealer in alcoholic beverages. Petitioners were convicted by a jury in the Eastern District of Missouri on both counts of a two-count indictment. The first count charged them with failure to "produce" or to "preserve" certain purchase records, in violation of 72 Stat. 1400, 26 U. S. C. § 5603 (b)(5). The second count charged them with failure "to keep" certain purchase records or "make required entries therein" in violation of 72 Stat. 1400, 26 U. S. C. § 5603 (b)(1). Petitioner James A. Michaels, Jr., was sentenced to imprisonment for one year and fined $1,000 on the first count;* he was fined an additional $1,000 on the second count. Petitioner Michaels Enterprises, Inc., was fined $1,000 on each of the two counts.

*This is the maximum penalty provided by the statute.

The critical issue, as we see it, is whether the record contains sufficient evidence of violations of the two counts to support the imposition of nonconcurrent sentences. The Court of Appeals for the Eighth Circuit refused to consider the "question of sufficiency of the evidence to support the verdict," on the ground that petitioners "did not move for an acquittal at the close of all the evidence." 321 F. 2d 913, 917. The record clearly shows, however, that petitioners did move for "judgment of acquittal at the close of all the evidence," as well as "at the close of the government's case."

The writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for consideration of the sufficiency of the evidence.

It is so ordered.

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BRUNING *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 423. Argued March 3, 1964.—Decided March 23, 1964.

United States is entitled to recover interest on tax claims for the period from the filing of a petition in bankruptcy to the date of payment of such claims from property acquired by the bankrupt after discharge in bankruptcy, where the tax claims under § 17 of the Federal Bankruptcy Act were not discharged in the bankruptcy proceedings. *New York* v. *Saper*, 336 U. S. 328, distinguished. Pp. 358–363.

317 F. 2d 229, affirmed.

Ernest R. Mortenson argued the cause and filed a brief for petitioner.

Philip B. Heymann argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issue presented in this case is whether the United States is entitled to recover, out of assets acquired by a debtor after his adjudication of bankruptcy, post-petition interest on a tax assessment which (under § 17 of the Federal Bankruptcy Act, 30 Stat. 544, 550, as amended, 11 U. S. C. § 35) was not discharged in the bankruptcy proceedings. The essential facts are not in dispute. Petitioner incurred withholding and federal insurance contributions taxes during the fourth quarter of 1951 but failed to pay those taxes when due. In March 1952, an assessment of those taxes was made against petitioner. On July 6, 1953, petitioner filed a voluntary petition in bankruptcy and was adjudicated a bankrupt in the Fed-

eral District Court for the Western District of Louisiana. The District Director of Internal Revenue filed a claim in the bankruptcy proceedings for the assessed amount owed by petitioner, and the United States received a small distribution out of the assets of the bankruptcy estate. Petitioner was granted a discharge in bankruptcy in October 1953, and the case was closed in June 1954.

In 1957, petitioner filed claims for refund of income taxes paid for the years 1953 and 1954, which resulted in his being allowed a credit for income taxes and interest in respect of those years. On March 7, 1958, the Director of Internal Revenue applied the entire 1953 credit and part of the 1954 credit [1] to the balance of the assessment of the withholding and F. I. C. A. taxes owed for 1951, plus interest to date—including interest which had accrued during the period between the filing of petitioner's petition in bankruptcy (July 6, 1953) and the date of payment (March 7, 1958). This post-petition interest, which totals about $795, is the subject of the present controversy. Petitioner did not question the Director's right to collect from assets acquired by petitioner after bankruptcy the unpaid principal of the tax debt and the pre-petition interest. However, contending that he was not liable for interest accruing on the assessment after his petition in bankruptcy was filed, petitioner brought suit in the Federal District Court for the Southern District of California for refund of that portion of the interest. The District Court held that petitioner's personal liability for post-petition interest on the unpaid taxes was not discharged by the bankruptcy proceedings, and the Court of Appeals for the Ninth Circuit affirmed. Due to an apparent conflict between circuits [2] and the potentially recurring nature of the question involved, we

[1] The remainder was distributed to petitioner.

[2] See *United States* v. *Mighell*, 273 F. 2d 682 (C. A. 10th Cir. 1959).

granted certiorari, 375 U. S. 920. We affirm the decision below.

Section 17 of the Federal Bankruptcy Act, 11 U. S. C. § 35, provides in relevant part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States . . . ."

It is undisputed that, under § 17, petitioner remained personally liable after his discharge for that part of the principal amount of the tax debt and pre-petition interest not satisfied out of the bankruptcy estate. The courts below held that, under § 17, petitioner also remained personally liable for post-petition interest on the tax debt, and we find no substantial reason to reverse that holding. Initially, one would assume that Congress, in providing that a certain type of debt should survive bankruptcy proceedings as a personal liability of the debtor, intended personal liability to continue as to the interest on that debt as well as to its principal amount. Thus, it has never been seriously suggested that a creditor whose claim is not provable against the trustee in bankruptcy loses his right to interest in a post-bankruptcy action brought against the debtor personally. In most situations, interest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt. Interest on a tax debt would seem to fit that description. Thus, logic and reason indicate that post-petition interest on a tax claim excepted from discharge by § 17 of the Act should be recoverable in a later action against the debtor personally, and there is no evidence of any congressional intent to the contrary.

Petitioner suggests that the Government might have ignored the bankruptcy proceeding entirely and later

brought suit upon its undischarged claim against petitioner personally and collected both principal and interest. But petitioner asserts that once the Government filed a claim in the bankruptcy proceeding, its rights became limited to the recovery of unpaid sums allowed by the trustee, not including post-petition interest. This argument is based on § 6873 (a) of the Internal Revenue Code of 1954, which provides:

> "Any portion of a claim for taxes allowed in . . . any proceeding under the Bankruptcy Act which is unpaid shall be paid by the taxpayer upon notice and demand from the Secretary or his delegate after the termination of such proceeding."

We find no indication in the wording or history of § 6873 (a) that the section was meant to limit the Government's right to continuing interest on an undischarged and unpaid tax liability. Nor is petitioner aided by the now-familiar principle that one main purpose of the Bankruptcy Act is to let the honest debtor begin his financial life anew. As the Court of Appeals noted, § 17 is not a compassionate section for debtors. Rather, it demonstrates congressional judgment that certain problems—*e. g.*, those of financing government—override the value of giving the debtor a wholly fresh start.[3] Congress clearly intended that personal liability for unpaid tax debts survive bankruptcy. The general humanitarian purpose of the Bankruptcy Act provides no reason to believe that Congress had a different intention with regard to personal liability for the interest on such debts.

Finally, petitioner urges that we consider the present case in light of the decision in *New York* v. *Saper*, 336 U. S. 328. As to claims against the trustee in bankruptcy, the general rule for liquidation of the bankruptcy estate

[3] One reason for refusing to make taxes dischargeable is the desire to prevent tax evasion. See 83 Cong. Rec. 9106 (1938).

has long been that a creditor will be allowed interest only to the date of the petition in bankruptcy. *Sexton* v. *Dreyfus*, 219 U. S. 339. In *New York* v. *Saper*, *supra*, this Court held that the general rule applies to claims against the trustee for taxes as well as for other debts. But the instant case concerns the debtor's personal liability for post-petition interest on a debt for taxes which survives bankruptcy to the extent that it is not paid out of the estate. Petitioner asserts that the traditional rule which denies post-petition interest as a claim against the bankruptcy estate also applies to discharge the debtor from personal liability for such interest even if the underlying tax debt is not discharged by § 17. We hold that it does not so apply.

The basic reasons for the rule denying post-petition interest as a claim against the bankruptcy estate are the avoidance of unfairness as between competing creditors and the avoidance of administrative inconvenience.[4]

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[4] See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line R. Co.*, 233 U. S. 261, 266:

"And it is true, as held in *Tredegar Co.* v. *Seaboard Ry.*, 183 Fed. Rep. 289, 290, that as a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of

These reasons are inapplicable to an action brought against the debtor personally. In the instant case, collection of post-petition interest cannot inconvenience administration of the bankruptcy estate, cannot delay payment from the estate unduly, and cannot diminish the estate in favor of high interest creditors at the expense of other creditors. In *New York* v. *Saper, supra,* the Court found the reasons for the traditional rule applicable and held that post-petition interest on a claim for taxes was not to be allowed against the bankruptcy estate. Here, we find the reasons—and thus the rule—inapplicable, and we hold that post-petition interest on an unpaid tax debt not discharged by § 17 remains, after bankruptcy, a personal liability of the debtor.

Affirmed.

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the principal of the debt. But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid."

See also *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 164:

"Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided. Moreover, different creditors whose claims bore diverse interest rates or were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay."

Because the traditional rule rests upon such practical considerations, it has been suggested that:

"The principle that interest stops running from the date of the filing of the petition in bankruptcy should be understood as a rule of liquidation practice rather than as a rule of substantive law." 3 Collier, Bankruptcy (14th ed., 1961) 1858.

PRESTON *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 163. Argued February 25, 1964.—Decided March 23, 1964.

Petitioner and two companions, who had been seated for several hours in a parked car, were arrested by the police for vagrancy, searched for weapons, and taken to the police station. The officers had the car towed to a garage, and soon thereafter they went themselves to the garage and for the first time searched the car. Various articles found in the car were later turned over to federal authorities and used as evidence in a trial in federal court resulting in petitioner's conviction of conspiracy to rob a federally insured bank. *Held:* The evidence obtained in the search of the car without a warrant was inadmissible because, being too remote in time or place to be treated as incidental to the arrest, it failed to meet the test of reasonableness under the Fourth Amendment. Pp. 364–368.

305 F. 2d 172, reversed and remanded.

Francis M. Shea, by appointment of the Court, 374 U. S. 823, argued the cause and filed briefs for petitioner.

Sidney M. Glazer argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner and three others were convicted in the United States District Court for the Eastern District of Kentucky on a charge of conspiracy to rob a federally insured bank in violation of 18 U. S. C. § 2113, the conviction having been based largely on evidence obtained by the search of a motorcar. The Court of Appeals for the Sixth Circuit affirmed, rejecting the contentions, timely made in the trial and appellate courts, that

both the original arrest, on a charge of vagrancy, and the subsequent search and seizure had violated the Fourth Amendment. 305 F. 2d 172. We granted certiorari. 373 U. S. 931. In the view we take of the case, we need not decide whether the arrest was valid, since we hold that the search and seizure was not.

The police of Newport, Kentucky, received a telephone complaint at 3 o'clock one morning that "three suspicious men acting suspiciously" had been seated in a motorcar parked in a business district since 10 o'clock the evening before. Four policemen straightaway went to the place where the car was parked and found petitioner and two companions. The officers asked the three men why they were parked there, but the men gave answers which the officers testified were unsatisfactory and evasive. All three men admitted that they were unemployed; all of them together had only 25 cents. One of the men said that he had bought the car the day before (which later turned out to be true), but he could not produce any title. They said that their reason for being there was to meet a truck driver who would pass through Newport that night, but they could not identify the company he worked for, could not say what his truck looked like, and did not know what time he would arrive. The officers arrested the three men for vagrancy, searched them for weapons, and took them to police headquarters. The car, which had not been searched at the time of the arrest, was driven by an officer to the station, from which it was towed to a garage. Soon after the men had been booked at the station, some of the police officers went to the garage to search the car and found two loaded revolvers in the glove compartment. They were unable to open the trunk and returned to the station, where a detective told one of the officers to go back and try to get into the trunk. The officer did so, was able to enter the trunk through the back seat of the car, and in

the trunk found caps, women's stockings (one with mouth and eye holes), rope, pillow slips, an illegally manufactured license plate equipped to be snapped over another plate, and other items. After the search, one of petitioner's companions confessed that he and two others—he did not name petitioner—intended to rob a bank in Berry, Kentucky, a town about 51 miles from Newport. At this, the police called the Federal Bureau of Investigation into the case and turned over to the Bureau the articles found in the car. It was the use of these articles, over timely objections, which raised the Fourth Amendment question we here consider.

The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers. *Elkins* v. *United States,* 364 U. S. 206 (1960). Our cases make it clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible. *E. g., Carroll* v. *United States,* 267 U. S. 132 (1925); *Brinegar* v. *United States,* 338 U. S. 160 (1949). Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of

a house may be reasonable in the case of a motorcar. See *Carroll* v. *United States, supra,* 267 U. S., at 153. But even in the case of motorcars, the test still is, was the search unreasonable. Therefore we must inquire whether the facts of this case are such as to fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made.

It is argued that the search and seizure was justified as incidental to a lawful arrest. Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks* v. *United States,* 232 U. S. 383, 392 (1914); *Agnello* v. *United States,* 269 U. S. 20, 30 (1925). This right to search and seize without a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States, supra,* 267 U. S., at 158, and, to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States, supra,* 269 U. S., at 30; *Marron* v. *United States,* 275 U. S. 192, 199 (1927); *United States* v. *Rabinowitz,* 339 U. S. 56, 61–62 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. *Agnello* v. *United States, supra,* 269 U. S., at 31. Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had

probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place. See *Stoner* v. *California, post,* p. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Cf. *United States* v. *Jeffers,* 342 U. S. 48, 51–52 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll* v. *United States, supra,* 267 U. S., at 153. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.

Reversed and remanded.

HUMBLE PIPE LINE CO. *v.* WAGGONNER, SHERIFF.

CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 329. Argued March 4, 1964.—Decided March 23, 1964.*

The United States by donation from the State of Louisiana and other state sources acquired fee simple title to a tract of land for a military base, state law providing that except for civil and criminal process the United States should have the "right of exclusive jurisdiction" over any land it "purchased or condemned, or otherwise acquired." The Government granted petitioners oil and gas leases on parts of the land, and the State levied an ad valorem tax on their pipelines and equipment. *Held:* The United States has exclusive jurisdiction over the land and the State has no jurisdiction to levy the tax. Pp. 370–374.

(a) The United States acquires exclusive jurisdiction over land which a State donates for a purpose enumerated in Article I, § 8, cl. 17, of the Constitution, even though it did not "purchase" the land in a narrow trading sense. *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, followed. Pp. 370–372.

(b) The United States did not lose its exclusive jurisdiction by leasing portions of the property. *S. R. A., Inc.*, v. *Minnesota*, 327 U. S. 558, distinguished. Pp. 372–373.

(c) Payments by the Government to state agencies for public utility services for the base and for educating children of servicemen living on the base wholly fail to show a rejection by the Government of exclusive jurisdiction over the base. P. 373.

(d) Abandonment of exclusive federal jurisdiction cannot be inferred from a standard provision in the oil and gas leases for payment by the lessees of state and federal taxes, even if the federal agency making the leases had power to waive the Government's exclusive jurisdiction, which is by no means sure. P. 374.

151 So. 2d 575, reversed and remanded.

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*Together with No. 354, *Natural Gas & Oil Corp. et al.* v. *Waggonner, Sheriff*, also on certiorari to the same court.

Leon O'Quin argued the cause and filed briefs for petitioner in No. 329.

Clarence L. Yancey argued the cause for petitioners in No. 354. With him on the brief was *Clyde R. Brown.*

Ferdinand A. Cashio, Assistant Attorney General of Louisiana, argued the cause for respondent in both cases. With him on the briefs were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Carroll Buck,* First Assistant Attorney General.

Solicitor General Cox and *Roger P. Marquis* filed a brief for the United States in both cases, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The common question these cases present is whether the United States has such exclusive jurisdiction over a 22,000-acre tract of land in Louisiana on which the Barksdale Air Force Base is located that Louisiana is without jurisdiction to levy an ad valorem tax on privately owned property situated on the tract. The District Court and Court of Appeal of Louisiana upheld such a tax laid on certain oil drilling equipment and pipelines owned, used and kept by the petitioners on this federal enclave. 151 So. 2d 575. The Supreme Court of Louisiana denied review. 244 La. 463, 467, 152 So. 2d 561, 562. We granted certiorari to consider this federal question important to the United States. 375 U. S. 878.[1]

The United States acquired a fee simple title to the entire tract in 1930 by donations from the State of Louisiana,[2] the City of Shreveport, and the Bossier Levee District, a state agency, for the purpose of using the land as

[1] No issue concerning immunity of federal instrumentalities from state taxation, apart from the question of lack of state jurisdiction to tax within a federal enclave, has been raised here.

[2] Act No. 4, Louisiana Legislature, 1930.

a military base. The Government has spent huge amounts of money in creating and operating at Barksdale Field one of its most important military posts. When the State and its agencies gave the land to the United States, Louisiana law provided that the United States should have "the right of exclusive jurisdiction" over any land it "purchased or condemned, or otherwise acquired . . . for all purposes, except the administration of the criminal laws . . . and the service of civil process of said State therein . . . ."[3] All of the pipelines or equipment in question upon which the State's ad valorem tax has been imposed are, as the Louisiana District Court stated, "situated on the United States Military Reservation known as 'Barksdale Air Force Base' . . . ."

Article I, § 8, cl. 17, of the United States Constitution permits the United States to obtain exclusive jurisdiction over lands within a State. It provides:

> "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

Louisiana contends that the United States cannot "exercise exclusive Legislation" here because the land for the military base was donated, not "purchased" within the meaning of the constitutional provision. We cannot agree to such a constricted reading of that provision. Louisiana concedes that, as we pointed out in our recent

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[3] Act No. 12, Louisiana Legislature, 1892, subsequently amended by Act No. 31, Louisiana Legislature, 1942, La. Rev. Stat. 1950, Tit. 52, c. 1, § 1. The deed to the United States was for a fee simple, and unlike that in *Palmer* v. *Barrett*, 162 U. S. 399, the authorizing statute contained no conditions and reserved only "the administration of the criminal laws . . . and the service of civil process."

holding in *Paul* v. *United States,* 371 U. S. 245, 264, the Government could, with the State's consent, have acquired exclusive jurisdiction by condemning the land. See also *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 141–142. This common-sense reading of the constitutional provision simply follows the interpretation given it long ago in *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 538:

> "The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects."

In accordance with this construction the Court in that case went on to emphasize that although the United States had not "purchased" Fort Leavenworth in the narrow trading sense of the term, the crucial question was whether Kansas had ceded exclusive jurisdiction over the fort. Likewise, we hold here that under Art. I, § 8, cl. 17, the United States acquired exclusive jurisdiction when the land was ceded to it with consent of the State (except for the State's express reservation as to civil and criminal process) just as if the United States had acquired its title by negotiation and payment of a money consideration.

Relying on the fact that the United States has leased the right to exploit parts of the reservation for oil and gas and for an oil pipeline, Louisiana contends that the Federal Government has thereby lost its power to exercise exclusive jurisdiction over those parts of the area. We cannot agree. We did hold in *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, that where the United States, while retaining what was in substance a mortgage, had sold land and buildings formerly used for governmental purposes it thereby in effect surrendered its former exclusive jurisdiction, leaving that property taxable by the State. But that case does not control the present situation, for here the Government continues to hold all the land subject to

its primary jurisdiction and control.[4] This Court has previously held that exclusive federal jurisdiction was not lost either by lease of property for commercial purposes within an enclave, *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, or by conveying a right of way to a railroad across a reservation, *United States* v. *Unzeuta,* 281 U. S. 138. And in holding that exclusive jurisdiction was not lost over a part of a reservation used for farming, this Court recognized the responsibility of the Executive Department of the Government to determine what land it will acquire and hold for military purposes. *Benson* v. *United States,* 146 U. S. 325, 331. There is no evidence here which would justify a court in deciding that the Government does not need to keep all of this tract intact, ready for use when needed for the highly important military purposes to which it has been dedicated.

Louisiana further contends that this record shows that the Government did not intend to accept exclusive jurisdiction here. It is the established rule that a grant of jurisdiction by a State to the Federal Government need not be accepted and that a refusal to accept may be proved by evidence. *Atkinson* v. *State Tax Comm'n,* 303 U. S. 20, 23; *Silas Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 207–209. The State's contention is based chiefly on a statement that Barksdale Air Force Base buys public utility services from the State or a state instrumentality at its gate and pays to the State's school system a per capita charge for each child of a serviceman attending the State's schools. We think these circumstances wholly fail to show a rejection by the Government of the State's cession of exclusive jurisdiction over the base.[5]

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[4] The fact that the oil and gas leases were issued by the Department of the Interior rather than the Department of the Air Force does not affect the exclusive jurisdiction of the United States.

[5] But cf. *International Business Machines Corp.* v. *Ott,* 230 La. 666, 701–702, 89 So. 2d 193, 205–206.

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Nor do we think it possible to find a refusal or an abandonment of exclusive federal jurisdiction from the fact that the oil and gas leases provided that the companies should "pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property, or assets of the lessee . . . ." It is by no means sure that a federal agency making an oil and gas lease could waive the Government's exclusive jurisdiction over a federal reservation, but even if it could we see nothing more in this standard contractual provision than a precaution on the Government's part to guard itself against liability for payment of any state taxes "lawfully assessed" against its lessee. Cf. *United States* v. *County of Allegheny,* 322 U. S. 174, 189. A contractual requirement to pay taxes lawfully owing, standing alone, cannot be read as manifesting a purpose of the Government to abandon exclusive jurisdiction over one of its important military enclaves. When Congress has wished to allow a State to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U. S. C. §§ 104–110.

The judgments are reversed and the cases remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus.

A. L. MECHLING BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 58. Argued February 18, 1964.—
Decided March 23, 1964.*

The Interstate Commerce Commission (ICC), after a hearing, issued an order permitting appellee railroad to depart from the long- and short-haul restrictions of § 4 of the Interstate Commerce Act. The ICC refused to pass on: the contention of the appellant Board of Trade that the proposed rail rates discriminated against Chicago grain merchants and processors (§ 3 (1) of the Act); appellant barge line's contention that the rates discriminated between connecting carriers (§ 3 (4) of the Act); and the claim that the rates were not just and reasonable (§ 1 (5) of the Act). Nor did the ICC make a direct finding, despite appellants' insistence, that the railroad's new rate structure did not violate the National Transportation Policy. The District Court approved the action of the Commission. *Held:* Appellants' claims that the proposed rail rates violated other sections of the Act and were contrary to the National Transportation Policy were ripe for adjudication and should have been considered in the § 4 proceeding; the ICC's failure to consolidate the issues and reach the merits of the several contentions could only result in manifest inequities, potential windfalls to some carriers, and contravention of the National Transportation Policy. Pp. 376–388.

209 F. Supp. 744, reversed and remanded.

Edward B. Hayes argued the cause and filed briefs for appellants in No. 58.

Harold E. Spencer argued the cause for appellant in No. 59. With him on the briefs was *Richard M. Freeman.*

*Together with No. 59, *Board of Trade of the City of Chicago* v. *United States et al.*, also on appeal to the same court.

Frank I. Goodman argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Orrick,* and *Robert B. Hummel.*

H. Neil Garson argued the cause for the Interstate Commerce Commission, appellee in both cases. With him on the brief was *Robert W. Ginnane.*

Richard J. Murphy argued the cause and filed a brief for New York Central Railroad Co., appellee in No. 59. *Leo P. Day* filed a brief for McNabb Grain Co. et al., appellees in No. 59.

MR. JUSTICE CLARK delivered the opinion of the Court.

This direct appeal from a final judgment of a three-judge District Court is but another episode in the long and continued struggle between the railroads and competing barge lines. In 1960 the Interstate Commerce Commission issued an order permitting a departure from the long- and short-haul provision of § 4 of the Inter-

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[1] 24 Stat. 380, as amended, 71 Stat. 292, 49 U. S. C. § 4 (1):

"(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point

state Commerce Act.[1] 310 I. C. C. 437. This order permitted the New York Central and connecting carriers to inaugurate a rate structure on its Belt Line west of Kankakee, Illinois, to eastern destinations under which lower rates were charged for some long hauls than for shorter ones on the same route. The District Court approved this action by dismissing a complaint to set aside the order. 209 F. Supp. 744. We noted probable jurisdiction, 374 U. S. 823, and now reverse the judgment with directions that the District Court vacate the order of the Commission and remand for further consideration in light of this opinion.

I.

The New York Central operates the Kankakee Belt Line, which extends from South Bend, Indiana, through Kankakee, Illinois, and westward to Zearing, Illinois. That portion of the line west of Kankakee to Moronts, Illinois, roughly parallels the Illinois River in Northern Illinois and is used, in large part, to transport corn toward eastern markets. In the mid-1930's, the Illinois River was developed for barge movement and almost all of the corn

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that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further,* That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further,* That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

traffic was drawn away from the rails to the river, corn being moved to Chicago by barge and then shipped to the East by rail.[2] Prior to 1957, barge rates from ports along the Illinois River to Chicago averaged 4.625¢ per hundred pounds of corn.[3] From Chicago to eastern destinations, rail rates were 49¢ per hundred pounds of corn and 49.5¢ for corn products, so that the total shipping cost from ports on the Illinois River to the East was 53.625¢ for corn and 54.125¢ for corn products. At the same time, rates for shipping corn via all-rail routes from origins on the Belt Line to eastern markets averaged 72¢ for corn and 72.5¢ for corn products, computed either as through rates or as a combination of a 23¢ rail rate to Chicago and the 49¢ or 49.5¢ rate from Chicago to the East.

The railroads chose to meet the barge competition by establishing a new rate structure on December 15, 1956, with a proportional rate[4] for rail shipments of corn to Kankakee which was competitive with the barge rate to Chicago. The railroads continued the regular rates for transportation of corn to Kankakee from points on the Belt Line but allowed credit on reshipment from Kankakee to eastern points which resulted in a net rate of 6¢[5] for transportation from Belt Line points to Kankakee. The 6¢ proportional rate applies only if the corn is milled in transit and only if it is reshipped to the East. Because of the credit, the resulting rate system favors eastbound shipments of corn from Belt Line points west of Kankakee over similar shipments via the same route starting

[2] Reshipment of a commodity which has previously been shipped by barge is termed "ex-barge." When prior transportation is by rail, reshipment is termed "ex-rail."

[3] Raised to 4.825¢ in December 1957.

[4] A rate which covers only a portion of the total transportation and is therefore only a portion of the total transportation charge.

[5] The net rate was 5¢ when the plan was established, later 5½¢, and now 6¢.

at Kankakee. For this reason the rate structure violates the long- and short-haul prohibition of § 4 of the Act and the railroads had to apply for authority for fourth-section departures. In 1957 a temporary fourth-section order was entered authorizing the filing and immediate application of the rates but not approving them, "all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act." The application was set down for hearing, but the Commission did not exercise its power to enter into a general investigation of the lawfulness of the rates under § 15 (1) or § 15 (7) of the Act, 41 Stat. 484–487, as amended, 49 U. S. C. §§ 15 (1), 15 (7). Nor did the appellants file a formal complaint under § 13 of the Act, 24 Stat. 383–384, as amended, 49 U. S. C. § 13, assailing the lawfulness of the rates.

Subsequently the Examiner denied § 4 relief because Belt Line rates to Kankakee were less than the out-of-pocket cost and were "lower than necessary to meet the barge competition." [6] The Commission reversed, holding that the proportional rate from origins along the Kankakee Belt Line to Kankakee "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin" [7] to the East. The Commission found that the through combination rate was compensatory and that since the barges attracted the corn grown adjacent to the river and the rails attracted that along the Belt Line, the rates were not lower than necessary to meet the barge rates and did not constitute destructive competition.

The Chicago Board of Trade, which had intervened in the proceeding, charged that the rates violated § 3 (1) of

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[6] Proposed report, sheet 26.

[7] 310 I. C. C. 437, 450.

the Act[8] (as well as § 4) because they discriminated against Chicago grain merchants and processors. The Commission refused to pass upon the question as not being relevant to a § 4 proceeding. Nor did the Commission consider Mechling's contention that the rates violated § 3 (4) of the Act[9] because they discriminated between connecting carriers. Other objections that the rates violated § 1 (5) of the Act[10] as not being just and

[8] 24 Stat. 380, as amended, 54 Stat. 902, 49 U. S. C. § 3 (1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

[9] 24 Stat. 380, as amended, 54 Stat. 903–904, 49 U. S. C. § 3 (4):

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

[10] 24 Stat. 379, as amended, 41 Stat. 475, 49 U. S. C. § 1 (5):

"All charges made for any service rendered or to be rendered in the transportation of passengers or property . . . as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

reasonable were likewise refused consideration. While the Commission found that the railroad's action was not a competitively destructive practice, it made no direct finding that the action did not violate the National Transportation Policy,[11] despite the appellants' insistence that it did.

The District Court approved the Commission's action in all respects and dismissed the complaint, holding "that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission." 209 F. Supp., at 749.

We have concluded that there is error in the holding in two respects: (1) The Commission should have passed upon the questions raised and evidence offered that the rates violated other sections of the Act; (2) the Commis-

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[11] National Transportation Policy, 54 Stat. 899, 49 U. S. C., note preceding § 1:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

sion erred in failing to specifically consider and pass upon the question of whether the rates violated the National Transportation Policy.

II.

Contentions were made and proof was offered by the Chicago Board of Trade of discriminatory violations of § 3 (1) of the Act, especially discrimination against whole corn by the milling-in-transit limitation. Under the conclusion of the Examiner that the fourth-section application should be denied, it was not necessary to pass upon the § 3 (1) contention. However, when the Commission took the opposite view on the § 4 application, the claim under § 3 (1) was ripe for decision. The Commission found that "[a]lthough the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." 310 I. C. C. 437, 451.

Likewise, appellant Mechling claims discrimination against the barge lines at Chicago in violation of § 3 (4) of the Act, which prohibits carriers from practicing rate discrimination between connecting lines, including common carriers by water. The gist of the grievance is the assertion that the New York Central rate structure results in lower reshipping rates for ex-rail corn eastbound from Chicago than for ex-barge corn. Mechling urges that the Commission should have allowed full inquiry into this contention and should have determined whether § 3 (4) is being violated.

In defense of its position the Commission says that it does not grant relief under § 4 when the rates proposed result in violations of other sections of the Act. However, the Commission does not believe that this policy requires it to consider and decide, in a fourth-section pro-

ceeding, every allegation of rate unlawfulness, no matter how remote. Continuing, the Commission argues that since the attack on the rates was on a proportional factor, the 6¢, and not on the through charge, these other claims of unlawfulness were beyond the immediate § 4 issues. We cannot agree that the mechanism of the rate under attack permits of such easy dismemberment. Indeed, there is a definite tie-in that prevents the compartmentalization of the elements going into the combination. The 6¢ is not a separate charge but is the result of the railroad's combination rate. The shipper is charged 23¢ for the transportation of corn from points west to Kankakee, with milling-in-transit, and is allowed a 17¢ credit on the rate from Kankakee to the East, either direct or via Chicago, on the transportation of the resulting corn products. This combination rate has a real impact on the freight originating along the Belt Line. Further, the rate is not "remote," as is shown by the undisputed statement of counsel at argument that the barges have lost 53% of their carriage since it was made effective in 1957.

If the proceeding is splintered, contestants will be obliged to await the conclusion of § 4 proceedings before raising claims of violations under other sections of the Act. Not only would this be poor administration but it would result in manifest inequities and allow potential windfalls to some carriers.

Moreover, such splintering appears to be contrary to the consistent policy of the Commission in fourth-section proceedings. Over 50 years ago the Commission said:

> "[T]he proviso authorizing this Commission to permit exceptions to the general prohibition of . . . [Section 4] is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such ex-

ceptions legal and proper and in no wise antagonistic to other provisions of the act." *Railroad Comm'n of Nevada* v. *Southern Pac. Co.*, 21 I. C. C. 329, 341 (1911).

In at least 10 subsequent cases,[12] as well as in its annual reports, the Commission has re-emphasized the same principle. See 34 I. C. C. Ann. Rep. 47. Furthermore, the application of all of the Act's prohibitions against discrimination "as a whole" furthers the purpose of the Congress in its enactment. The Senate Committee on Interstate Commerce once stated it this way:

> "The provisions of the . . . [Interstate Commerce Act] are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment . . . ." S. Rep. No. 46, 49th Cong., 1st Sess., 215–216 (1886).

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[12] *Transcontinental Cases of 1922*, 74 I. C. C. 48, 71; *Commodity Rates on Lumber and Other Forest Products, In Carloads, From South Pacific Coast Territory To Points In Central Freight Association Territory*, 165 I. C. C. 561, 569; *Differential Routes To Central Territory*, 211 I. C. C. 403, 421; *Bituminous Coal to Buffalo, N. Y.*, 219 I. C. C. 554, 560; *Pig Iron To Butler, Pa.*, 222 I. C. C. 1, 2; *Iron and Steel to Minnesota*, 231 I. C. C. 425, 428; *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota*, 278 I. C. C. 163, 168–169; *Coal and Coal Briquets in the South*, 289 I. C. C. 341, 376–377; *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.*, 296 I. C. C. 147, 153; *Nepheline Syenite from Ontario, Canada, to the East*, 308 I. C. C. 561, 564–565.

In accordance with this policy, this Court declared in *New York* v. *United States,* 331 U. S. 284, 296 (1947), that "[t]he principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." In the *Intermountain Rate Cases,* 234 U. S. 476, 485–486 (1914), the Court held that the Commission's power to relieve carriers from the requirements of § 4 depends upon

> "the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned *and in view of the preference and discrimination clauses of the second and third sections.*" (Emphasis added.)

The fact that the long- and short-haul prohibition of § 4 is particularized does not require any different interpretation. The Congress might well have concluded that such a practice was so pernicious that it required specific condemnation.[13]

Finally, by hearing and determining, in a single proceeding, all charges of discrimination bearing upon the formal § 4 application, the Commission would further the legislative purpose as declared by the National Transportation Policy. It directed that the Interstate Commerce Act "shall be administered and enforced with a view to carrying out" its purpose "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . ." 54 Stat. 899, 49 U. S. C., note preceding § 1.

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[13] Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 884.

We do not say that such a rule of consolidation is an absolute. Many of these applications are filed each year and the Commission summarily disposes of the majority of them. Certainly where issues are not raised or brought to adversary position there is no need to consolidate. Likewise, where consolidation would inordinately delay the § 4 proceeding, good administration would require its denial. However, in the instant case, we see no practical reason why the merits of the several contentions should not have been reached.[14] To require the parties to begin anew and thus spawn several cases, all of which might have been easily disposed of in the § 4 proceeding, needlessly subjects appellants' claims to the rigors of circumlocution so deadly to effective administrative and judicial processes. This proceeding is now in its seventh year—during all of which period the rate under attack has been in force—and, still, basic questions as to the validity of the rate have not been considered by the Commission.

III.

The Examiner entered a finding, which is uncontested, that the proportional rate here under attack did not cover the out-of-pocket costs of the railroad. In spite of this finding, the Commission gave little, if any, consideration to any resulting violation of the National Transportation Policy. There is no economic analysis, no expert testimony, no supporting data. Instead, the Commission found that the through rate, which it

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[14] On Mechling's claimed violation of § 3 (4), proof on cross-examination was offered before the Examiner and refused as being relevant only in a "division case." The report of the Commission is silent on the point. It was stated before the Examiner that the record "made fairly plain" the contention which, if true, should permit the Commission to proceed on remand to pass upon it; if not, then the record should be supplemented by stipulation or by additional evidence before the Examiner, if necessary.

thought compensatory, rather than the Belt Line proportional rate, was controlling. Viewed in this manner, the Commission determined that the rate was not a destructively competitive practice. However, it supported this conclusion only with passing references to the first-year experience under the rate of two Illinois elevators and 10 Illinois River ports. One of the elevators had experienced no adverse effects from the rate while the other had lost some grain grown closer to the Belt Line. The 10 ports experienced about a 23% larger corn shipment to Chicago but the proportion of this increase to the whole grain movement is not shown. Nevertheless, the Commission concluded from this "that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition." 310 I. C. C. 437, 452. In contradiction to this we have the undenied statement of counsel at argument, quoting statistics of the Chicago Board of Trade, that much corn traffic has been diverted from barge to rail since the rate went into effect, so that the barge lines carried 53% less corn to Chicago in 1963 than they did in 1957. The finding that the through rate was compensatory does not answer the question of whether the direct effect of the below-cost proportional rate on the Belt Line traffic is wholly at odds with the National Transportation Policy. Prior to the establishment of the rate, the barge lines enjoyed practically all of the traffic. However, the combination rate appears to have diverted appreciable traffic from the barge lines without any apparent profit to the railroad. Indeed, the Commission has not indicated whether any additional traffic resulted on the rail haul between Chicago or Kankakee and New York. We, therefore, do not believe it sufficient for the Commission to approve such a rate simply on a finding that the through

rate is reasonably compensatory and no lower than necessary to meet competition. In light of the facts present here, the claim of violation of the National Transportation Policy, raised and insisted upon by the appellants at all stages of the proceedings, must be specifically considered.

The judgment is, therefore, reversed and the cases are remanded to the District Court with directions to vacate the order of the Commission and remand for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES ET AL. *v.* J. B. MONTGOMERY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 66. Argued January 8, 1964.—Decided March 23, 1964.

Appellee is a contract carrier which had been authorized to transport a variety of commodities for shippers in specified businesses. Acting under § 212 (c) of the Interstate Commerce Act as amended in 1957, the Interstate Commerce Commission (ICC) converted appellee's contract carrier permit into a common carrier certificate but imposed the restriction, challenged by appellee in this proceeding, that shipments be limited to those "from, to, or between wholesale and retail outlets" and stores. *Held:* The ICC in sanctioning the conversion of appellee's contract carrier permit into a common carrier certificate had authority under § 212 (c) to impose only such restrictions as those under which the contract carrier was operating before the conversion; and appellee may therefore continue to exercise such privileges as it then enjoyed. Pp. 389–396.

206 F. Supp. 455, affirmed.

Frank I. Goodman, pro hac vice, by special leave of Court, argued the cause for the United States et al. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Elliott H. Moyer, Robert W. Ginnane* and *Betty Jo Christian.*

Charles W. Singer argued the cause and filed a brief for appellee.

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal tests the validity of an order of the Interstate Commerce Commission issued under § 212 (c) of the Interstate Commerce Act as amended in 1957, 71 Stat. 411, 49 U. S. C. § 312 (c),[1] converting the appellee's con-

[1] "The Commission shall examine each outstanding permit and may within one hundred and eighty days after . . . [August 22, 1957] institute a proceeding either upon its own initiative, or upon application of

tract carrier permit into a common carrier certificate but limiting its coverage "to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract." Appellee contends that this limitation violates the mandate of the Congress in § 212 (c) that any certificate so issued "shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." The Commission answers that the restrictions are necessary to maintain "substantial parity" between the appellee's old and new operations. The District Court held the Commission "without statutory authority to impose the restrictions in question" and set aside the order and remanded the case for further proceedings. 206 F. Supp. 455, 461. Probable jurisdiction was noted. 372 U. S. 952. We affirm the judgment.

I.

Prior to 1957 appellee operated under a contract carrier permit originally issued in 1943 under the "grandfather" clause contained in § 209 (a) of the Motor Carrier Act, 1935, 49 Stat. 543, 552.[2] It permitted carriage of: (1) such

a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on . . . [August 22, 1957] do not conform with the definition of a contract carrier in section 203 (a)(15) as in force on and after . . . [August 22, 1957]; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." 71 Stat. 411.

[2] This provision is now substantially contained in 49 U. S. C. § 309 (a)(1):

"Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier

commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials and supplies used in the conduct of such business; (2) such commodities as are usually dealt in, or used, by meat, fruit, and vegetable packing houses; and (3) such commodities as are usually dealt in, or used, by wholesale and retail department stores. The permit contained a "Keystone restriction" [3] which limited appellee to transporting such commodities only under contracts with persons operating the businesses specified. It permitted the carriage of a wide variety of commodities within specified territories, without limitation of consignee, but only for those shippers under contract with appellee and engaged in the specified businesses.

In 1957, at the behest of the Commission, the Congress amended the statutory definition of a contract carrier, § 203 (a)(15) of the Interstate Commerce Act, so as to thereafter read:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation

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by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935 . . . ."

[3] The phrase "Keystone restriction" comes from the title of the proceeding, *Keystone Transportation Co. Contract Carrier Application*, 19 M. C. C. 475. Such restrictions were approved by this Court in *Noble* v. *United States*, 319 U. S. 88 (1943).

> by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." [4]

In order to protect existing contract carrier permits, Congress enacted § 212 (c) which, as we have indicated, provided for the revocation of such a permit in appropriate proceedings before the Commission and the issuance of a common carrier certificate. In so doing, however, the Congress provided that the resulting common carrier certificate "shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

In 1958 these proceedings were begun under this section and, after extended hearings, the Examiner found that the permit should be revoked and the common carrier certificate issued covering the same commodities and without restrictions. In addition he recommended the inclusion of authority for carriage of "materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois

[4] 71 Stat. 411, 49 U. S. C. § 303 (a)(15). The former § 203 (a)(15) stated the definition as follows: "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." 54 Stat. 920.

within 100 miles of Chicago, to Denver . . . ." The Commission adopted the latter recommendation and it was not contested in the District Court. As to the remaining authorizations, the Commission appended to the recommendations of the Examiner a restriction against combining or "tacking" appellee's various operating rights in order to render a through service (likewise not contested), and also subjected each grant of authority to the following restriction:

> "RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, . . ."

The validity of this restriction is the sole challenge raised in this proceeding.

II.

The Commission contends that § 212 (c), read in the light of its background, is a "grandfather clause." Its purpose, therefore, is merely to continue, without expanding, the authority of those contract carriers whose operations are lawful under *United States* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409 (1956), by revoking their contract carrier permits and issuing in lieu thereof common carrier certificates. The Commission concludes that, while the Congress specified only a continuance of the commodity and territorial limitations, Congress also intended that the effects of the "Keystone restriction" in the old permit be carried forward in the new one. Even if this is incorrect, the Commission says that it remains free to impose the restriction by reason of its general power under the Interstate Commerce Act to confine carrier operations within appropriate limits.

The difficulty with this argument is that the "Keystone restriction" under which appellee operated permitted it to carry commodities "dealt in, or used by" certain businesses without limitation, except that appellee was re-

quired to have a contract with the shipper so engaged. Although the Commission has eliminated this last requirement by certificating appellee as a common carrier, the restriction it has imposed here limits shipments "to shipments moving from, to, or between wholesale and retail outlets" and stores. Appellee insists that this restriction limits its carriage in that appellee cannot deliver from a supplier to a consumer, to or from a public warehouse or ship dock, between warehouses, to consolidation or transfer points or to a laborer or modification agent. The record does not show whether appellee exercised these claimed privileges under its contract carrier permit. We hold that if it did enjoy them or any others that we have not enumerated, then it is entitled to have the same freedom in its common carrier certificate.

The legislative history indicates that the Commission in its presentation to the Congress on § 212 (c) represented through its Chairman that the legislation would disturb no property rights of the contract carrier. Indeed, it asserted that such carriers would have "greater opportunity." [5] Moreover, the "Keystone restrictions"

[5] During the hearings before the Subcommittee of the Senate Interstate and Foreign Commerce Committee the following colloquy occurred between Mr. Barton, transportation counsel of the committee, and Mr. Clarke, then chairman of the Interstate Commerce Commission:

"Mr. BARTON: . . .

"Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?

"Mr. CLARKE: No; I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier. *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill *he would also have the opportunity to serve the general public as well as the obligation.*" (Emphasis added.) Hearings before the United States Senate Subcommittee on Surface Transpor-

received the attention of the Congress. In the same Senate hearings, the difference between contract and common carriers was made clear, *i. e.*, while the former were limited in the "character" of their carriage to the type of commodities named in their permits, they were not limited to particular shippers. Common carriers, on the other hand, were not limited in any way in their certificated territories.[6] It appears to us that Congress intended to leave the converted contract carrier in as good a position as it previously enjoyed. Under the facts claimed, the Commission has not done so in this case.

We do not believe that appellee waived its rights by not proving that it had exercised the claimed privileges under its contract carrier permit. The permit has no restriction on its face in this regard, and such proof was understandably not presented in light of the recommendation of the Examiner that a common carrier permit include no restrictions whatever. At this late date it would be unfair to strip appellee of its claimed rights upon this basis.

Nor do we believe that the Commission can impose the restrictions on a rule of "substantial parity" under its general powers. Since § 212 (c) specifically commands that the Commission "shall" authorize the same carriage as was included in the contract carrier permit, we are unable to place § 212 (c) authority under the general power of other unrelated sections, such as § 208, where specific power is granted to assure "substantial parity." The appellee carried on certain operations under its contract carrier permit. Congress intended that these operations be continued under the common carrier permit.

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tation of the Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., Surface Transportation—Scope of Authority of I. C. C., p. 35.

[6] *Id.*, at 182.

The judgment of the District Court is therefore affirmed. On remand the Commission will be free to contest appellee's factual claims as to what service it performed under its contract carrier permit and to limit the common carrier certificate to such activity.

Affirmed.

MR. JUSTICE HARLAN, concurring.

I agree with what I understand to be the basic premise of the Court's holding—that the Commission may, under § 212 (c), carry over "Keystone" restrictions in converting a contract carrier's permit into a common carrier certificate, but may not impose any *new* limitations on the scope of the carrier's operations.

Appellee contends that the language of § 212 (c), comments by members of Congress, and the traditional notion that a common carrier serves the "public" suggest a congressional intent to preclude the continuance of Keystone restrictions in the certificates of converted carriers. Although this argument is not without force, it leads to the conclusion that the Commission is powerless to prevent even the widest expansion of the previous activities of a converted carrier, resulting from the replacement of its contract carrier permit by a common carrier certificate. Absent what I regard as compelling evidence that Congress intended so to cripple the supervisory power of the Commission, I am constrained to read § 212 (c) as consistent with other statutory provisions dealing with national transportation and to conclude that the Commission may limit the entry of the converted carriers into types of carriage previously proscribed to them.

Nonetheless, there appears to be no persuasive support in the language of § 212 (c), legislative history, or policy for permitting the Commission to inhibit activities open to the carrier before conversion. Congress

evinced an intent not to impose any new limitations on carriers subject to conversion, and, in view of the greater obligations owed by common carriers and the more extensive regulation to which they are subject, it is difficult to argue that the maintenance of existing carriage privileges will advantage the converted carriers to the possible prejudice of other common carriers. The Commission, therefore, may not include in the common carrier certificate a Keystone restriction that renders impermissible operations allowed under the contract carrier permit.

The determinative consideration in fixing the limit to the Commission's power is, according to these principles, the authorization conferred by the contract carrier permit; absent dormancy or abandonment, the extent of appellee's actual prior operations should be irrelevant. Since in the proceedings before the Commission appellee contended that § 212 (c) is inconsistent with any Keystone restriction and the Commission's position was that it is fettered in imposing such restrictions only by the concept of "substantial parity," the questions of dormancy or abandonment were not dealt with in the Commission proceedings, but the Commission should be free to consider any such issue on remand.

On these bases I concur in the judgment of the Court.

BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 16. Argued October 22–23, 1963.—Decided March 23, 1964.

Respondent American commodity broker, contracted with a Cuban corporation largely owned by United States residents to buy Cuban sugar. Thereafter, subsequent to the United States Government's reduction of the Cuban sugar quota, the Cuban Government expropriated the corporation's property and rights. To secure consent for shipment of the sugar, the broker by a new contract agreed to make payment for the sugar to a Cuban instrumentality which thereafter assigned the bills of lading to petitioner, another Cuban instrumentality, and petitioner instructed its agent in New York to deliver to the broker the bills of lading and sight draft in return for payment. The broker accepted the documents, received payment for the sugar from its customer, but refused to deliver the proceeds to petitioner's agent. Petitioner brought this action for conversion of the bills of lading to recover payment from the broker and to enjoin from exercising dominion over the proceeds a receiver who had been appointed by a state court to protect the New York assets of the corporation. The District Court concluded that the corporation's property interest in the sugar was subject to Cuba's territorial jurisdiction and acknowledged the "act of state" doctrine, which precludes judicial inquiry in this country respecting the public acts of a recognized foreign sovereign power committed within its own territory. The court, nevertheless, rendered summary judgment against the petitioner, ruling that the act of state doctrine was inapplicable when the questioned act violated international law, which the District Court found had been the case here. The Court of Appeals affirmed, additionally relying upon two State Department letters which it took as evidencing willingness by the Executive Branch to a judicial testing of the validity of the expropriation. *Held:*

1. The privilege of resorting to United States courts being available to a recognized sovereign power not at war with the United States, and not being dependent upon reciprocity of treatment, petitioner has access to the federal courts. Pp. 408–412.

2. The propriety of the taking was not governed by New York law since the sugar itself was expropriated. P. 413.

3. This suit is not uncognizable in American courts as being one to enforce the "public" acts of a foreign state since the expropriation law here involved had been fully executed within Cuba. Pp. 413–415.

4. The Government's uncontested assertion that the two State Department letters expressed only the then wish of the Department to avoid commenting on the litigation, obviates the need for this Court to pass upon the "*Bernstein* exception" to the act of state doctrine, under which a court may respond to a representation by the Executive Branch that in particular circumstances it does not oppose judicial consideration of the foreign state's act. Pp. 418–420.

5. The scope of the act of state doctrine must be determined according to federal law. Pp. 421–427.

6. The act of state doctrine applies and is desirable with regard to a foreign expropriation even though the expropriation allegedly violates customary international law. Pp. 427–437.

(a) Disagreement exists as to relevant standards of international law concerning a State's responsibility toward aliens. P. 430.

(b) The political branch can more effectively deal with expropriation than can the Judicial Branch. Pp. 431–432.

(c) Conflicts between the Judicial and Executive Branches could hardly be avoided were the judiciary to adjudicate with respect to the validity of expropriations. Even if the combination alleged in this case of retaliation, discrimination, and inadequate compensation made the expropriation here violative of international law, a judicial determination to that effect would still be unwise as involving potential conflict with or embarrassment to the Executive Branch in later litigation. Pp. 432–433.

7. A foreign country's status as a plaintiff does not make the act of state doctrine inapplicable. Pp. 437–438.

307 F. 2d 845, reversed and remanded.

Victor Rabinowitz argued the cause for petitioner. With him on the briefs was *Leonard B. Boudin.*

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C. Dickerman Williams argued the cause and filed briefs for respondent Farr, Whitlock & Co.

Deputy Attorney General Katzenbach, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Morton Hollander, John C. Eldridge* and *Andreas F. Lowenfeld.*

James A. Dixon filed a brief for the Pan-American Life Insurance Co., as *amicus curiae,* urging reversal.

Whitney North Seymour argued the cause for Compania Azucarera Vertientes-Camaguey de Cuba, as *amicus curiae,* urging affirmance. With him on the brief were *Eastman Birkett, John A. Guzzetta* and *Thomas W. Cashel.*

Briefs of *amici curiae,* urging affirmance, were filed by *Charles S. Rhyne, Churchill Rodgers, Max Chopnick, Benjamin Busch, Nicholas R. Doman* and *Leo M. Drachsler* for the American Bar Association; by *Pieter J. Kooiman, Myres S. McDougal* and *Cecil J. Olmstead* for the Executive Committee of the American Branch of the International Law Association; by *Herbert Brownell, James M. Edwards* and *Jack P. Jefferies* for the Committee on International Law of the Association of the Bar of the City of New York; and by *John Lord O'Brian, John G. Laylin, Brice M. Clagett* and *Ky P. Ewing, Jr.* for North American Sugar Industries, Inc., et al.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question which brought this case here, and is now found to be the dispositive issue, is whether the so-called act of state doctrine serves to sustain petitioner's claims in this litigation. Such claims are ultimately founded on a decree of the Government of Cuba expropriating certain

property, the right to the proceeds of which is here in controversy. The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.

I.

In February and July of 1960, respondent Farr, Whitlock & Co., an American commodity broker, contracted to purchase Cuban sugar, free alongside the steamer, from a wholly owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.), a corporation organized under Cuban law whose capital stock was owned principally by United States residents. Farr, Whitlock agreed to pay for the sugar in New York upon presentation of the shipping documents and a sight draft.

On July 6, 1960, the Congress of the United States amended the Sugar Act of 1948 to permit a presidentially directed reduction of the sugar quota for Cuba.[1] On the same day President Eisenhower exercised the granted power.[2] The day of the congressional enactment, the Cuban Council of Ministers adopted "Law No. 851," which characterized this reduction in the Cuban sugar quota as an act of "aggression, for political purposes" on the part of the United States, justifying the taking of countermeasures by Cuba. The law gave the Cuban President and Prime Minister discretionary power to nationalize by forced expropriation property or enterprises in which American nationals had an interest.[3] Al-

[1] 74 Stat. 330.

[2] Proclamation No. 3355, 74 Stat. c72, effective upon publication in the Federal Register, July 8, 1960, 25 Fed. Reg. 6414.

[3] "WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at

though a system of compensation was formally provided, the possibility of payment under it may well be deemed illusory.[4] Our State Department has described the Cuban law as "manifestly in violation of those principles

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the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

. . . . .

"WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interest or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

"NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

"LAW No. 851

"ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws." Record, at 98–99.

[4] See *id.*, Articles 4–7. Payment for expropriated property would consist of bonds with terms of at least 30 years and bearing 2% annual interest. The interest was not to be cumulative from year to year and was to be paid only out of 25% of the yearly foreign

of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." [5]

Between August 6 and August 9, 1960, the sugar covered by the contract between Farr, Whitlock and C. A. V.[6] was loaded, destined for Morocco, onto the S. S. *Hornfels*, which was standing offshore at the Cuban port of Jucaro (Santa Maria). On the day loading commenced, the Cuban President and Prime Minister, acting pursuant to Law No. 851, issued Executive Power Resolution No. 1. It provided for the compulsory expropriation of all property and enterprises, and of rights and interests arising therefrom, of certain listed companies, including C. A. V., wholly or principally owned by American nationals. The preamble reiterated the alleged injustice of the American reduction of the Cuban sugar quota and emphasized the importance of Cuba's serving as an example for other countries to follow "in their struggle to free themselves from the brutal claws of Imperialism." [7] In consequence

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exchange received by sales of Cuban sugar to the United States in excess of 3,000,000 Spanish long tons at a minimum price of 5.75 cents per English pound. (In the preceding 10 years the annual average price had never been that high and in only one of those years had as many as 3,000,000 Spanish long tons been sold, 307 F. 2d, at 862.) The bonds were to be amortized only upon the authority of the President of the National Bank. The President and Prime Minister of the Cuban state were empowered to choose the appraisers. It is not clear whether the bonds were to be paid at maturity if funds were insufficient at that time.

[5] See State Dept. Note No. 397, July 16, 1960 (to Cuban Ministry of Foreign Relations).

[6] The parties have treated the interest of the wholly owned subsidiary as if it were identical with that of C. A. V.; hence no distinction between the two companies will be drawn in the remainder of this opinion.

[7] "WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests

of the resolution, the consent of the Cuban Government was necessary before a ship carrying sugar of a named company could leave Cuban waters. In order to obtain this consent, Farr, Whitlock, on August 11, entered into contracts, identical to those it had made with C. A. V.,

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of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

"WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

"WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

"WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures deemed necessary to counteract the harm done by the aggression inflicted upon our nation.

. . . . .

"WHEREAS, it is the duty of the peoples of Latin America to strive for the recovery of their native wealth by wresting it from the hands of the foreign monopolies and interests which prevent their development, promote political interference, and impair the sovereignty of the underdeveloped countries of America.

"WHEREAS, the Cuban Revolution will not stop until it shall have totally and definitely liberated its fatherland.

"WHEREAS, Cuba must be a luminous and stimulating example for the sister nations of America and all the underdeveloped countries of the world to follow in their struggle to free themselves from the brutal claws of Imperialism. [*Footnote 7 continued on p. 405*]

with the Banco Para el Comercio Exterior de Cuba, an instrumentality of the Cuban Government. The S. S. *Hornfels* sailed for Morocco on August 12.

Banco Exterior assigned the bills of lading to petitioner, also an instrumentality of the Cuban Government, which instructed its agent in New York, Societe Generale, to deliver the bills and a sight draft in the sum of $175,250.69 to Farr, Whitlock in return for payment. Societe Generale's initial tender of the documents was refused by Farr, Whitlock, which on the same day was notified of C. A. V.'s claim that as rightful owner of the sugar it was entitled to the proceeds. In return for a promise not to turn the funds over to petitioner or its agent, C. A. V. agreed to indemnify Farr, Whitlock for any loss.[8] Farr, Whitlock subsequently accepted the shipping documents, negotiated the bills of lading to its customer, and

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"NOW, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,

"RESOLVE:

"FIRST. To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, to wit:

. . . . .

"22. Compañá Azucarera Vertientes Camagüey de Cuba.

. . . . .

"SECOND. Consequently, the Cuban State is hereby subrogated in the place and stead of the juridical persons listed in the preceding section, in respect of the property, rights and interests aforesaid, and of the assets and liabilities constituting the capital of said enterprises." Record, at 102–105.

[8] C. A. V. also agreed to pay Farr, Whitlock 10% of the $175,000 if C. A. V. ever obtained that sum. 307 F. 2d, at 851.

received payment for the sugar. It refused, however, to hand over the proceeds to Societe Generale. Shortly thereafter, Farr, Whitlock was served with an order of the New York Supreme Court, which had appointed Sabbatino as Temporary Receiver of C. A. V.'s New York assets, enjoining it from taking any action in regard to the money claimed by C. A. V. that might result in its removal from the State. Following this, Farr, Whitlock, pursuant to court order, transferred the funds to Sabbatino, to abide the event of a judicial determination as to their ownership.

Petitioner then instituted this action in the Federal District Court for the Southern District of New York. Alleging conversion of the bills of lading, it sought to recover the proceeds thereof from Farr, Whitlock and to enjoin the receiver from exercising any dominion over such proceeds. Upon motions to dismiss and for summary judgment, the District Court, 193 F. Supp. 375, sustained federal *in personam* jurisdiction despite state control of the funds. It found that the sugar was located within Cuban territory at the time of expropriation and determined that under merchant law common to civilized countries Farr, Whitlock could not have asserted ownership of the sugar against C. A. V. before making payment. It concluded that C. A. V. had a property interest in the sugar subject to the territorial jurisdiction of Cuba. The court then dealt with the question of Cuba's title to the sugar, on which rested petitioner's claim of conversion. While acknowledging the continuing vitality of the act of state doctrine, the court believed it inapplicable when the questioned foreign act is in violation of international law. Proceeding on the basis that a taking invalid under international law does not convey good title, the District Court found the Cuban expropriation decree to violate such law in three

separate respects: it was motivated by a retaliatory and not a public purpose; it discriminated against American nationals; and it failed to provide adequate compensation. Summary judgment against petitioner was accordingly granted.

The Court of Appeals, 307 F. 2d 845, affirming the decision on similar grounds, relied on two letters (not before the District Court) written by State Department officers which it took as evidence that the Executive Branch had no objection to a judicial testing of the Cuban decree's validity. The court was unwilling to declare that any one of the infirmities found by the District Court rendered the taking invalid under international law, but was satisfied that in combination they had that effect. We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area. 372 U. S. 905. For reasons to follow we decide that the judgment below must be reversed.

Subsequent to the decision of the Court of Appeals, the C. A. V. receivership was terminated by the State Supreme Court; the funds in question were placed in escrow, pending the outcome of this suit. C. A. V. has moved in this Court to be substituted as a party in the place of Sabbatino. Although it is true that Sabbatino's defensive interest in this litigation has largely, if not entirely, reflected that of C. A. V., this is true also of Farr, Whitlock's position. There is no indication that Farr, Whitlock has not adequately represented C. A. V.'s interest or that it will not continue to do so. Moreover, insofar as disposition of the case here is concerned, C. A. V. has been permitted as *amicus* to brief and argue its position before this Court. In these circumstances we are not persuaded that the admission of C. A. V. as a party is

necessary at this stage to safeguard any claim either that it has already presented or that it may present in the future course of this litigation. Accordingly, we are constrained to deny C. A. V.'s motion to be admitted as a party,[9] without prejudice however to the renewal of such a motion in the lower courts if it appears that C. A. V.'s interests are not adequately represented by Farr, Whitlock and that the granting of such a motion will not disturb federal jurisdiction. Cf. *Strawbridge* v. *Curtiss,* 3 Cranch 267; *Indianapolis* v. *Chase Nat'l Bank,* 314 U. S. 63, at 69; *Ex parte Edelstein,* 30 F. 2d 636, at 638.

Before considering the holding below with respect to the act of state doctrine, we must deal with narrower grounds urged for dismissal of the action or for a judgment on the merits in favor of respondents.

II.

It is first contended that this petitioner, an instrumentality of the Cuban Government, should be denied access to American courts because Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts. Even though the respondents did not raise this point in the lower courts we think it should be considered here. If the courts of this country should be closed to the government of a foreign state, the underlying reason is one of national policy transcending the interests of the parties to the action, and this Court should give effect to that policy *sua sponte* even at this stage of the litigation.

Under principles of comity governing this country's relations with other nations, sovereign states are allowed

[9] Because of C. A. V.'s *amicus* position in this Court, and because its arguments have been presented separately from those of Farr, Whitlock, even though each has adopted the other's contentions, this opinion refers to "respondents" although Farr, Whitlock is the only formal party-respondent.

to sue in the courts of the United States, *The Sapphire*, 11 Wall. 164, 167; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. This Court has called "comity" in the legal sense "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton* v. *Guyot*, 159 U. S. 113, 163–164. Although comity is often associated with the existence of friendly relations between states, *e. g.*, *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589; *Russian Republic* v. *Cibrario*, 235 N. Y. 255, 258, 139 N. E. 259, 260, prior to some recent lower court cases which have questioned the right of instrumentalities of the Cuban Government to sue in our courts,[10] the privilege of suit has been denied only to governments at war with the United States, *Ex parte Don Ascanio Colonna*, 314 U. S. 510; see § 7 of the Trading with the Enemy Act, 40 Stat. 416, 417, 50 U. S. C. App. § 7; cf. *Hanger* v. *Abbott*, 6 Wall. 532; *Caperton* v. *Bowyer*, 14 Wall. 216, 236, or to those not recognized by this country, *The Penza*, 277 F. 91; *Russian Republic* v. *Cibrario*, *supra*.[11]

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[10] In *P & E Shipping Corp.* v. *Banco Para El Comercio Exterior de Cuba*, 307 F. 2d 415 (C. A. 1st Cir.), the court *sua sponte* questioned the right of Cuba to sue. It concluded that the matter was one for the Executive Branch to decide and remanded the case to the District Court to elicit the views of the State Department. The trial court in *Dade Drydock Corp.* v. *The M/T Mar Caribe*, 199 F. Supp. 871 (S. D. Tex.), apparently equated the severance of diplomatic relations with the withdrawal of recognition and suspended the action "until the Government of the Republic of Cuba is again recognized by the United States of America," *id.*, at 874. In two other cases, however, *Pons* v. *Republic of Cuba*, 111 U. S. App. D. C. 141, 294 F. 2d 925; *Republic of Cuba* v. *Mayan Lines, S. A.*, 145 So. 2d 679 (Ct. App., 4th Cir., La.), courts have upheld the right of Cuba to sue despite the severance of diplomatic relations.

[11] The District Court in *The Gul Djemal*, 296 F. 563, 296 F. 567, did refuse to permit the invocation of sovereign immunity by the Turkish Government, with whom the United States had broken

Respondents, pointing to the severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country, contend that relations between the United States and Cuba manifest such animosity that unfriendliness is clear, and that the courts should be closed to the Cuban Government. We do not agree. This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts. Although the severance of diplomatic relations is an overt act with objective significance in the dealings of sovereign states, we are unwilling to say that it should inevitably result in the withdrawal of the privilege of bringing suit. Severance may take place for any number of political reasons, its duration is unpredictable, and whatever expression of animosity it may imply does not approach that implicit in a declaration of war.

It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control, see *Russian Republic* v. *Cibrario, supra,* at 260–263, 139 N. E., at 261–263. Political recognition is exclusively a function of the Executive. The possible incongruity of judicial "recognition," by permitting suit, of a government not recognized by the Executive is com-

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diplomatic relations, on the theory that under such circumstances comity did not require the granting of immunity. The case was affirmed, 264 U. S. 90, but on another ground.

pletely absent when merely diplomatic relations are broken.[12]

The view that the existing situation between the United States and Cuba should not lead to a denial of status to sue is buttressed by the circumstance that none of the acts of our Government have been aimed at closing the courts of this country to Cuba, and more particularly by the fact that the Government has come to the support of Cuba's "act of state" claim in this very litigation.

Respondents further urge that reciprocity of treatment is an essential ingredient of comity generally, and, therefore, of the privilege of foreign states to bring suit here. Although *Hilton* v. *Guyot,* 159 U. S. 113, contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances. *Id.,* at 170–171. In *Direction der Disconto-Gesellschaft* v. *United States Steel Corp.,* 300 F. 741, 747 (D. C. S. D. N. Y.), Judge Learned Hand pointed out that the doctrine of reciprocity has apparently been confined to foreign judgments.

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[12] The doctrine that nonrecognition precludes suit by the foreign government in every circumstance has been the subject of discussion and criticism. See, *e. g.,* Hervey, The Legal Effects of Recognition in International Law (1928) 112–119; Jaffe, Judicial Aspects of Foreign Relations (1933) 148–156; Borchard, The Unrecognized Government in American Courts, 26 Am. J. Int'l L. 261 (1932); Dickinson, The Unrecognized Government or State in English and American Law, 22 Mich. L. Rev. 118 (1923); Fraenkel, The Juristic Status of Foreign States, Their Property and Their Acts, 25 Col. L. Rev. 544, 547–552 (1925); Lubman, The Unrecognized Government in American Courts: Upright v. Mercury Business Machines, 62 Col. L. Rev. 275 (1962). In this litigation we need intimate no view on the possibility of access by an unrecognized government to United States courts, except to point out that even the most inhospitable attitude on the matter does not dictate denial of standing here.

There are good reasons for declining to extend the principle to the question of standing of sovereign states to sue. Whether a foreign sovereign will be permitted to sue involves a problem more sensitive politically than whether the judgments of its courts may be re-examined, and the possibility of embarrassment to the Executive Branch in handling foreign relations is substantially more acute. Re-examination of judgments, in principle, reduces rather than enhances the possibility of injustice being done in a particular case; refusal to allow suit makes it impossible for a court to see that a particular dispute is fairly resolved. The freezing of Cuban assets exemplifies the capacity of the political branches to assure, through a variety of techniques (see *infra*, pp. 431, 435–436), that the national interest is protected against a country which is thought to be improperly denying the rights of United States citizens.

Furthermore, the question whether a country gives *res judicata* effect to United States judgments presents a relatively simple inquiry. The precise status of the United States Government and its nationals before foreign courts is much more difficult to determine. To make such an investigation significant, a court would have to discover not only what is provided by the formal structure of the foreign judicial system, but also what the practical possibilities of fair treatment are. The courts, whose powers to further the national interest in foreign affairs are necessarily circumscribed as compared with those of the political branches, can best serve the rule of law by not excluding otherwise proper suitors because of deficiencies in their legal systems.

We hold that this petitioner is not barred from access to the federal courts.[13]

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[13] Respondents suggest that suit may be brought, if at all, only by an authorized agent of the Cuban Government. Decisions establishing that privilege based on sovereign prerogatives may be evoked

III.

Respondents claimed in the lower courts that Cuba had expropriated merely contractual rights the situs of which was in New York, and that the propriety of the taking was, therefore, governed by New York law. The District Court rejected this contention on the basis of the right of ownership possessed by C. A. V. against Farr, Whitlock prior to payment for the sugar. That the sugar itself was expropriated rather than a contractual claim is further supported by Cuba's refusal to let the S. S. *Hornfels* sail until a new contract had been signed. Had the Cuban decree represented only an attempt to expropriate a contractual right of C. A. V., the forced delay of shipment and Farr, Whitlock's subsequent contract with petitioner's assignor would have been meaningless.[14] Neither the District Court's finding concerning the location of the S. S. *Hornfels* nor its conclusion that Cuba had territorial jurisdiction to expropriate the sugar, acquiesced in by the Court of Appeals, is seriously challenged here. Respondents' limited view of the expropriation must be rejected.

Respondents further contend that if the expropriation was of the sugar itself, this suit then becomes one to enforce the public law of a foreign state and as such is not cognizable in the courts of this country. They rely on the principle enunciated in federal and state cases that a

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only by such agents, *e. g.*, *The Anne*, 3 Wheat. 435; *Ex parte Muir*, 254 U. S. 522, 532–533; *The Sao Vicente*, 260 U. S. 151; *The "Gul Djemal,"* 264 U. S. 90, are not apposite to cases in which a state merely sues in our Courts without claiming any right uniquely appertaining to sovereigns.

[14] If Cuba had jurisdiction to expropriate the contractual right, it would have been unnecessary for it to compel the signing of a new contract. If Cuba did not have jurisdiction, any action which it took in regard to Farr, Whitlock or the sugar would have been ineffective to transfer C. A. V.'s claim.

court need not give effect to the penal or revenue laws of foreign countries or sister states. See, *e. g., The Antelope,* 10 Wheat. 66, 123; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Huntington* v. *Attrill,* 146 U. S. 657 (all relating to penal laws);[15] *Moore* v. *Mitchell,* 30 F. 2d 600, aff'd on other grounds, 281 U. S. 18; *City of Detroit* v. *Proctor,* 44 Del. 193, 61 A. 2d 412; *City of Philadelphia* v. *Cohen,* 11 N. Y. 2d 401, 184 N. E. 2d 167, 230 N. Y. S. 2d 188 (all relating to revenue laws).

The extent to which this doctrine may apply to other kinds of public laws, though perhaps still an open question,[16] need not be decided in this case. For we have been referred to no authority which suggests that the doctrine reaches a public law which, as here, has been fully executed within the foreign state. Cuba's restraint of the S. S. *Hornfels* must be regarded for these purposes to have constituted an effective taking of the sugar, vesting in Cuba C. A. V.'s property right in it. Farr, Whit-

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[15] As appears from the cases cited, a penal law for the purposes of this doctrine is one which seeks to redress a public rather than a private wrong.

[16] The doctrine may have a broader reach in Great Britain, see *Don Alonso* v. *Cornero,* Hob. 212a, Hobart's King's Bench Reps. 372; *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria,* [1935] 1 K. B. 140; *Attorney-General for Canada* v. *William Schulze & Co.,* [1901] 9 Scots L. T. Reps. 4 (Outer House); Dicey's Conflict of Laws, 162 (Morris ed. 1958); Mann, Prerogative Rights of Foreign States and the Conflict of Laws, 40 Grotius Society 25 (1955); but see *Lepage* v. *San Paulo Coffee Estates Co.,* [1917] W. N. 216 (High Ct. of Justice, Ch. Div.); *Lorentzen* v. *Lydden & Co.,* [1942] 2 K. B. 202; *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property,* [1954] 1 Weekly L. R. 139 (Q. B.), than in the United States, cf. *United States* v. *Belmont,* 85 F. 2d 542, rev'd, 301 U. S. 324 (possibility of broad rule against enforceability of public acts not discussed in either court), *United States* v. *Pink,* 284 N. Y. 555, 32 N. E. 2d 552, rev'd, 315 U. S. 203 (same); *Anderson* v. *N. V. Transandine Handelmaatschappij,* 289 N. Y. 9, 43 N. E. 2d 502; but see Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 194 (1932).

lock's contract with the Cuban bank, however compelled to sign Farr, Whitlock may have felt, represented indeed a recognition of Cuba's dominion over the property.

In these circumstances the question whether the rights acquired by Cuba are enforceable in our courts depends not upon the doctrine here invoked but upon the act of state doctrine discussed in the succeeding sections of this opinion.[17]

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[17] The courts below properly declined to determine if issuance of the expropriation decree complied with the formal requisites of Cuban law. In dictum in *Hudson* v. *Guestier*, 4 Cranch 293, 294, Chief Justice Marshall declared that one nation must recognize the act of the sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state. This principle has been followed in a number of cases. See, *e. g.*, *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438, 443, 444 (C. A. 2d Cir.); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C. A. 2d Cir.); *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corp.*, 28 F. Supp. 279 (D. C. S. D. N. Y.). But see *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527; cf. *Fremont* v. *United States*, 17 How. 542 (United States successor sovereign over land); *Sabariego* v. *Maverick*, 124 U. S. 261 (same); *Shapleigh* v. *Mier*, 299 U. S. 468 (same). An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question. Of course, such review can take place between States in our federal system, but in that instance there is similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.

Another ground supports the resolution of this problem in the courts below. Were any test to be applied it would have to be what effect the decree would have if challenged in Cuba. If no institution of legal authority would refuse to effectuate the decree, its "formal" status—here its argued invalidity if not properly published in the Official Gazette in Cuba—is irrelevant. It has not been seriously contended that the judicial institutions of Cuba would declare the decree invalid.

IV.

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, *Blad* v. *Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see, *e. g.*, *Ware* v. *Hylton*, 3 Dall. 199, 230; *Hudson* v. *Guestier*, 4 Cranch 293, 294; *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 135, 136; *L'Invincible*, 1 Wheat. 238, 253; *The Santissima Trinidad*, 7 Wheat. 283, 336, is found in *Underhill* v. *Hernandez*, 168 U. S. 250, where Chief Justice Fuller said for a unanimous Court (p. 252):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Following this precept the Court in that case refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action in this country by Underhill, an American citizen, who claimed that he had been unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *Shapleigh* v. *Mier*, 299 U. S.

468; *United States* v. *Belmont,* 301 U. S. 324; *United States* v. *Pink,* 315 U. S. 203. On the contrary in two of these cases, *Oetjen* and *Ricaud,* the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms.

Oetjen involved a seizure of hides from a Mexican citizen as a military levy by General Villa, acting for the forces of General Carranza, whose government was recognized by this country subsequent to the trial but prior to decision by this Court. The hides were sold to a Texas corporation which shipped them to the United States and assigned them to defendant. As assignee of the original owner, plaintiff replevied the hides, claiming that they had been seized in violation of the Hague Conventions. In affirming a judgment for defendant, the Court suggested that the rules of the Conventions did not apply to civil war and that, even if they did, the relevant seizure was not in violation of them. 246 U. S., at 301–302. Nevertheless, it chose to rest its decision on other grounds. It described the designation of the sovereign as a political question to be determined by the legislative and executive departments rather than the judicial department, invoked the established rule that such recognition operates retroactively to validate past acts, and found the basic tenet of *Underhill* to be applicable to the case before it.

> "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by

> the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Id.*, at 303–304.

In *Ricaud* the facts were similar—another general of the Carranza forces seized lead bullion as a military levy—except that the property taken belonged to an American citizen. The Court found *Underhill, American Banana,* and *Oetjen* controlling. Commenting on the nature of the principle established by those cases, the opinion stated that the rule

> "does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico . . . ." 246 U. S., at 309.

To the same effect is the language of Mr. Justice Cardozo in the *Shapleigh* case, *supra,* where, in commenting on the validity of a Mexican land expropriation, he said (299 U. S., at 471): "The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy."

In deciding the present case the Court of Appeals relied in part upon an exception to the unqualified teach-

ings of *Underhill, Oetjen,* and *Ricaud* which that court had earlier indicated. In *Bernstein* v. *Van Heyghen Freres Societe Anonyme,* 163 F. 2d 246, suit was brought to recover from an assignee property allegedly taken, in effect, by the Nazi Government because plaintiff was Jewish. Recognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that United States Courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint. In a later case involving similar facts the same court again assumed examination of the German acts improper, *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 173 F. 2d 71, but, quite evidently following the implications of Judge Hand's opinion in the earlier case, amended its mandate to permit evidence of alleged invalidity, 210 F. 2d 375, subsequent to receipt by plaintiff's attorney of a letter from the Acting Legal Adviser to the State Department written for the purpose of relieving the court from any constraint upon the exercise of its jurisdiction to pass on that question.[18]

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[18] The letter stated:

"1. This government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.

. . . . . .

"3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." State Department Press Release, April 27, 1949, 20 Dept. State Bull. 592.

This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now. For whatever ambiguity may be thought to exist in the two letters from State Department officials on which the Court of Appeals relied,[19] 307 F. 2d, at 858, is now removed by the position which the Executive has taken in this Court on the act of state claim; respondents do not indeed contest the view that these letters were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation.

The outcome of this case, therefore, turns upon whether any of the contentions urged by respondents against the application of the act of state doctrine in the premises is acceptable: (1) that the doctrine does not apply to acts of state which violate international law, as is claimed to be the case here; (2) that the doctrine is inapplicable unless the Executive specifically interposes it in a particular case; and (3) that, in any event, the doctrine may not be invoked by a foreign government plaintiff in our courts.

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[19] Abram Chayes, the Legal Adviser to the State Department, wrote on October 18, 1961, in answer to an inquiry regarding the position of the Department by Mr. John Laylin, attorney for *amici:*

"The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction."

A letter dated November 14, 1961, from George Ball, Under Secretary for Economic Affairs, responded to a similar inquiry by the same attorney:

"I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts."

V.

Preliminarily, we discuss the foundations on which we deem the act of state doctrine to rest, and more particularly the question of whether state or federal law governs its application in a federal diversity case.[20]

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill, supra; American Banana, supra; Oetjen, supra,* at 303, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another (*supra,* pp. 413–414) is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.

That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly.[21] No international arbitral

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[20] Although the complaint in this case alleged both diversity and federal question jurisdiction, the Court of Appeals reached jurisdiction only on the former ground, 307 F. 2d, at 852. We need not decide, for reasons appearing hereafter, whether federal question jurisdiction also existed.

[21] In English jurisprudence, in the classic case of *Luther* v. *James Sagor & Co.,* [1921] 3 K. B. 532, the act of state doctrine is articulated in terms not unlike those of the United States cases. See *Princess Paley Olga* v. *Weisz,* [1929] 1 K. B. 718. But see *Anglo-*

or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, see 1 Oppenheim's International Law, § 115aa (Lauterpacht, 8th ed. 1955), and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual

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Iranian Oil Co. v. *Jaffrate*, [1953] 1 Weekly L. R. 246, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.) (exception to doctrine if foreign act violates international law). Civil law countries, however, which apply the rule make exceptions for acts contrary to their sense of public order. See, *e. g.*, *Ropit* case, Cour de Cassation (France), [1929] Recueil Général Des Lois et Des Arrêts (Sirey) Part I, 217; 55 Journal Du Droit International (Clunet) 674 (1928), [1927–1928] Ann. Dig., No. 43; Graue, Germany: Recognition of Foreign Expropriations, 3 Am. J. Comp. L. 93 (1954); Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960) (discussion of and excerpts from opinions of the District Court in Bremen and the Hanseatic Court of Appeals in *N. V. Verenigde Deli-Maatschapijen* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H.*, and of the Amsterdam District Court and Appellate Court in *Senembah Maatschappij N. V.* v. *Republiek Indonesie Bank Indonesia*); Massouridis, The Effects of Confiscation, Expropriation, and Requisition by a Foreign Authority, 3 Revue Hellénique De Droit International 62, 68 (1950) (recounting a decision of the court of the first instance of Piraeus); *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 19 (Ct. of Venice), 78 Il Foro Italiano Part I, 719; 40 Blätter für Zürcherische Rechtsprechung No. 65, 172–173 (Switzerland). See also *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 312 (High Ct. of Tokyo).

to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. See *United States* v. *Diekelman,* 92 U. S. 520, 524. Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances, *Ware* v. *Hylton,* 3 Dall. 199, 281; *The Nereide,* 9 Cranch 388, 423; *The Paquete Habana,* 175 U. S. 677, 700, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.

Despite the broad statement in *Oetjen* that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments," 246 U. S., at 302, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr,* 369 U. S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Many

commentators disagree with this view;[22] they have striven by means of distinguishing and limiting past decisions and by advancing various considerations of policy to stimulate a narrowing of the apparent scope of the rule. Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

We could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation. New York has enunciated the act of state doctrine in terms that echo those of federal decisions decided during the reign of *Swift* v. *Tyson*, 16 Pet. 1. In *Hatch* v. *Baez*, 7 Hun 596, 599 (N. Y. Sup. Ct.), *Underhill* was foreshadowed by the words, "the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory." More recently, the Court of Appeals in *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 224, 186 N. E. 679, 681, has declared, "The courts of one independent government will not sit in judgment upon the validity of the acts of another done

[22] See, *e. g.*, Association of the Bar of the City of New York, Committee on International Law, A Reconsideration of the Act of State Doctrine in United States Courts (1959); Domke, *supra*, note 21; Mann, International Delinquencies Before Municipal Courts, 70 L. Q. Rev. 181 (1954); Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826 (1959). But see, *e. g.*, Falk, Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino, 16 Rutgers L. Rev. 1 (1961); Reeves, Act of State Doctrine and the Rule of Law—A Reply, 54 Am. J. Int'l L. 141 (1960).

within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries." Cf. *Dougherty* v. *Equitable Life Assurance Society,* 266 N. Y. 71, 193 N. E. 897; *Holzer* v. *Deutsche Reichsbahn-Gesellschaft,* 277 N. Y. 474, 14 N. E. 2d 798. But cf. *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.,* 251 N. Y. 243, 167 N. E. 430. Thus our conclusions might well be the same whether we dealt with this problem as one of state law, see *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U. S. 487; *Griffin* v. *McCoach,* 313 U. S. 498, or federal law.

However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.[23] It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co.* v. *Tompkins.* Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations.[24] He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

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[23] At least this is true when the Court limits the scope of judicial inquiry. We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.

[24] The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939).

The Court in the pre-*Erie* act of state cases, although not burdened by the problem of the source of applicable law, used language sufficiently strong and broad-sweeping to suggest that state courts were not left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under *Swift* v. *Tyson, supra*). The Court of Appeals in the first *Bernstein* case, *supra*, a diversity suit, plainly considered the decisions of this Court, despite the intervention of *Erie*, to be controlling in regard to the act of state question, at the same time indicating that New York law governed other aspects of the case. We are not without other precedent for a determination that federal law governs; there are enclaves of federal judge-made law which bind the States. A national body of federal-court-built law has been held to have been contemplated by § 301 of the Labor Management Relations Act, *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448. Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests, *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. Of course the federal interest guarded in all these cases is one the ultimate statement of which is derived from a federal statute. Perhaps more directly in point are the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters.

In *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92, 110, in an opinion handed down the same day as *Erie* and by the same author, Mr. Justice Brandeis, the Court declared, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." Although the suit was between two private litigants and

the relevant States could not be made parties, the Court considered itself free to determine the effect of an interstate compact regulating water apportionment. The decision implies that no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties. This would not mean that, absent a compact, the apportionment scheme could not be changed judicially or by Congress, but only that apportionment is a matter of federal law. Cf. *Arizona* v. *California*, 373 U. S. 546, 597–598. The problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes. The considerations supporting exclusion of state authority here are much like those which led the Court in *United States* v. *California*, 332 U. S. 19, to hold that the Federal Government possessed paramount rights in submerged lands though within the three-mile limit of coastal States. We conclude that the scope of the act of state doctrine must be determined according to federal law.[25]

VI.

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and

[25] Various constitutional and statutory provisions indirectly support this determination, see U. S. Const., Art. I, § 8, cls. 3, 10; Art. II, §§ 2, 3; Art. III, § 2; 28 U. S. C. §§ 1251 (a)(2), (b)(1), (b)(3), 1332 (a)(2), 1333, 1350–1351, by reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions. See Comment, The Act of State Doctrine—Its Relation to Private and Public International Law, 62 Col. L. Rev., 1278, 1297, n. 123; cf. *United States* v. *Belmont, supra; United States* v. *Pink, supra.*

political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.[26]

[26] Compare, *e. g.*, Friedman, Expropriation in International Law 206–211 (1953); Dawson and Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation? 30 Fordham L. Rev. 727 (1962), with Note from Secretary of State Hull to Mexican Ambassador, August 22, 1938, V Foreign Relations of the United

There is, of course, authority, in international judicial [27] and arbitral [28] decisions, in the expressions of national governments,[29] and among commentators [30] for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country.[31] Certain representatives of the newly independent and underdeveloped countries

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States 685 (1938); Doman, Postwar Nationalization of Foreign Property in Europe, 48 Col. L. Rev. 1125, 1127 (1948). We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals.

[27] See *Oscar Chinn Case*, P. C. I. J., ser. A/B, No. 63, at 87 (1934); *Chorzow Factory Case*, P. C. I. J., ser. A., No. 17, at 46, 47 (1928).

[28] See, *e. g.*, *Norwegian Shipowners' Case* (Norway/United States) (Perm. Ct. Arb.) (1922), 1 U. N. Rep. Int'l Arb. Awards 307, 334, 339 (1948), Hague Court Reports, 2d Series, 39, 69, 74 (1932); *Marguerite de Joly de Sabla*, American and Panamanian General Claims Arbitration 379, 447, 6 U. N. Rep. Int'l Arb. Awards 358, 366 (1955).

[29] See, *e. g.*, Dispatch from Lord Palmerston to British Envoy at Athens, Aug. 7, 1846, 39 British and Foreign State Papers 1849–1850, 431–432. Note from Secretary of State Hull to Mexican Ambassador, July 21, 1938, V Foreign Relations of the United States 674 (1938); Note to the Cuban Government, July 16, 1960, 43 Dept. State Bull. 171 (1960).

[30] See, *e. g.*, McNair, The Seizure of Property and Enterprises in Indonesia, 6 Netherlands Int'l L. Rev. 218, 243–253 (1959); Restatement, Foreign Relations Law of the United States (Proposed Official Draft 1962), §§ 190–195.

[31] See Doman, *supra*, note 26, at 1143–1158; Fleming, States, Contracts and Progress, 62–63 (1960); Bystricky, Notes on Certain International Legal Problems Relating to Socialist Nationalisation, in International Assn. of Democratic Lawyers, Proceedings of the Commission on Private International Law, Sixth Congress (1956), 15.

have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them [32] and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.[33]

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.[34]

When we consider the prospect of the courts characterizing foreign expropriations, however justifiably, as invalid under international law and ineffective to pass title, the wisdom of the precedents is confirmed. While each of the leading cases in this Court may be argued to be distinguishable on its facts from this one—*Underhill* because sovereign immunity provided an independent ground and *Oetjen*, *Ricaud*, and *Shapleigh* because there

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[32] See Anand, Role of the "New" Asian-African Countries in the Present International Legal Order, 56 Am. J. Int'l L. 383 (1962); Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 Am. J. Int'l L. 863 (1961).

[33] See 1957 Yb. U. N. Int'l L. Comm'n (Vol. 1) 155, 158 (statements of Mr. Padilla Nervo (Mexico) and Mr. Pal (India)).

[34] There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

was actually no violation of international law—the plain implication of all these opinions, and the import of express statements in *Oetjen,* 246 U. S., at 304, and *Shapleigh,* 299 U. S., at 471, is that the act of state doctrine is applicable even if international law has been violated. In *Ricaud,* the one case of the three most plausibly involving an international law violation, the possibility of an exception to the act of state doctrine was not discussed. Some commentators have concluded that it was not brought to the Court's attention,[35] but Justice Clarke delivered both the *Oetjen* and *Ricaud* opinions, on the same day, so we can assume that principles stated in the former were applicable to the latter case.

The possible adverse consequences of a conclusion to the contrary of that implicit in these cases is highlighted by contrasting the practices of the political branch with the limitations of the judicial process in matters of this kind. Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country.[36] Such decisions would, if the acts in-

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[35] See Restatement, Foreign Relations Law of the United States, Reporters' Notes (Proposed Official Draft 1962), § 43, note 3.

[36] It is, of course, true that such determinations might influence others not to bring expropriated property into the country, see pp. 433–434, *infra,* so their indirect impact might extend beyond the actual invalidations of title.

volved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect.

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law. would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest. Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and tradi-

tional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

Respondents contend that, even if there is not agreement regarding general standards for determining the validity of expropriations, the alleged combination of retaliation, discrimination, and inadequate compensation makes it patently clear that this particular expropriation was in violation of international law.[37] If this view is accurate, it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possibility of conflict with the Executive view. Even if the courts avoided this course, either by presuming the validity of an act of state whenever the international law standard was thought unclear or by following the State Department declaration in such a situation, the very expression of judicial uncertainty might provide embarrassment to the Executive Branch.

Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade.[38] If the attitude of the

[37] Of course, to assist respondents in this suit such a determination would have to include a decision that for the purpose of judging this expropriation under international law C. A. V. is not to be regarded as Cuban and an acceptance of the principle that international law provides other remedies for breaches of international standards of expropriation than suits for damages before international tribunals. See 307 F. 2d, at 861, 868 for discussion of these questions by the Court of Appeals.

[38] This possibility is consistent with the view that the deterrent effect of court invalidations would not ordinarily be great. If the expropriating country could find other buyers for its products at

United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act.[39]

Against the force of such considerations, we find respondents' countervailing arguments quite unpersuasive. Their basic contention is that United States courts could make a significant contribution to the growth of international law, a contribution whose importance, it is said, would be magnified by the relative paucity of decisional law by international bodies. But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural. Moreover, it rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free

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roughly the same price, the deterrent effect might be minimal although patterns of trade would be significantly changed.

[39] Were respondents' position adopted, the courts might be engaged in the difficult tasks of ascertaining the origin of fungible goods, of considering the effect of improvements made in a third country on expropriated raw materials, and of determining the title to commodities subsequently grown on expropriated land or produced with expropriated machinery.

By discouraging import to this country by traders certain or apprehensive of nonrecognition of ownership, judicial findings of invalidity of title might limit competition among sellers; if the excluded goods constituted a significant portion of the market, prices for United States purchasers might rise with a consequent economic burden on United States consumers. Balancing the undesirability of such a result against the likelihood of furthering other national concerns is plainly a function best left in the hands of the political branches.

enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.

It is contended that regardless of the fortuitous circumstances necessary for United States jurisdiction over a case involving a foreign act of state and the resultant isolated application to any expropriation program taken as a whole, it is the function of the courts to justly decide individual disputes before them. Perhaps the most typical act of state case involves the original owner or his assignee suing one not in association with the expropriating state who has had "title" transferred to him. But it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic channels, as more demanding of judicial cognizance than the claim of title by the innocent third party purchaser, who, if the property is taken from him, is without any remedy.

Respondents claim that the economic pressure resulting from the proposed exception to the act of state doctrine will materially add to the protection of United States investors. We are not convinced, even assuming the relevance of this contention. Expropriations take place for a variety of reasons, political and ideological as well as economic. When one considers the variety of means possessed by this country to make secure foreign investment, the persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison. The newly independent states are in need of continuing foreign investment; the creation of a climate unfavorable to such investment by wholesale confiscations may well work to their long-run economic disadvantage. Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals. Ultimately the sanctions of economic embargo and the freezing of assets in this country may be

employed. Any country willing to brave any or all of these consequences is unlikely to be deterred by sporadic judicial decisions directly affecting only property brought to our shores. If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill-advised to undermine indirectly.

It is suggested that if the act of state doctrine is applicable to violations of international law, it should only be so when the Executive Branch expressly stipulates that it does not wish the courts to pass on the question of validity. See Association of the Bar of the City of New York, Committee on International Law, A Reconsideration of the Act of State Doctrine in United States Courts (1959). We should be slow to reject the representations of the Government that such a reversal of the *Bernstein* principle would work serious inroads on the maximum effectiveness of United States diplomacy. Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret. Of course, a relevant consideration for the State Department would be the position contemplated in the court to hear the case. It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries. We do not now pass on the *Bernstein* exception, but even if it were deemed valid, its suggested extension is unwarranted.

However offensive to the public policy of this country and its constituent States an expropriation of this kind

may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.

VII.

Finally, we must determine whether Cuba's status as a plaintiff in this case dictates a result at variance with the conclusions reached above. If the Court were to distinguish between suits brought by sovereign states and those of assignees, the rule would have little effect unless a careful examination were made in each case to determine if the private party suing had taken property in good faith. Such an inquiry would be exceptionally difficult, since the relevant transaction would almost invariably have occurred outside our borders. If such an investigation were deemed irrelevant, a state could always assign its claim.

It is true that the problem of security of title is not directly presented in the instance of a sovereign plaintiff, although were such a plaintiff denied relief, it would ship its goods elsewhere, thereby creating an alteration in the flow of trade. The sensitivity in regard to foreign relations and the possibility of embarrassment of the Executive are, of course, heightened by the presence of a sovereign plaintiff. The rebuke to a recognized power would be more pointed were it a suitor in our courts. In discussing the rule against enforcement of foreign penal and revenue laws, the Eire High Court of Justice, in *Peter Buchanan Ltd.* v. *McVey,* [1955] A. C. 516, 529–530, aff'd, *id.,* at 530, emphasized that its justification was in large degree the desire to avoid embarrassing another state by scrutinizing its penal and revenue laws. Although that rule presumes invalidity in the forum whereas the act of state principle presumes the contrary, the doctrines have a common rationale, a rationale that negates

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the wisdom of discarding the act of state rule when the plaintiff is a state which is not seeking enforcement of a public act.

Certainly the distinction proposed would sanction self-help remedies, something hardly conducive to a peaceful international order. Had Farr, Whitlock not converted the bills of lading, or alternatively breached its contract, Cuba could have relied on the act of state doctrine in defense of a claim brought by C. A. V. for the proceeds. It would be anomalous to preclude reliance on the act of state doctrine because of Farr, Whitlock's unilateral action, however justified such action may have been under the circumstances.

Respondents offer another theory for treating the case differently because of Cuba's participation. It is claimed that the forum should simply apply its own law to all the relevant transactions. An analogy is drawn to the area of sovereign immunity, *National City Bank* v. *Republic of China*, 348 U. S. 356, in which, if a foreign country seeks redress in our courts, counterclaims are permissible. But immunity relates to the prerogative right not to have sovereign property subject to suit; fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it. The act of state doctrine, however, although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law. It is plain that if a recognized government sued on a contract with a United States citizen, concededly legitimate by the locus of its making, performance, and most significant contacts, the forum would not apply its own substantive law of contracts. Since the act of state doctrine reflects the desirability of presuming the relevant transaction valid, the same result follows; the forum may not apply its local law regarding foreign expropriations.

Since the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail. Whether a theory of conversion or breach of contract is the proper cause of action under New York law, the presumed validity of the expropriation is unaffected. Although we discern no remaining litigable issues of fact in this case, the District Court may hear and decide them if they develop.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, dissenting.

I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases. I am also disappointed in the Court's declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy. This backward-looking doctrine, never before declared in this Court, is carried a disconcerting step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act. Since the Court expressly extends its ruling to all acts of state expropriating property, however clearly inconsistent with the international com-

munity, all discriminatory expropriations of the property of aliens, as for example the taking of properties of persons belonging to certain races, religions or nationalities, are entitled to automatic validation in the courts of the United States. No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law.[1]

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[1] The courts of the following countries, among others, and their territories have examined a fully "executed" foreign act of state expropriating property:

England: *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.); *N. V. de Bataafsche Petroleum Maatschappij* v. *The War Damage Comm'n*, [1956] Int'l L. Rep. 810 (Singapore Ct. App.).

Netherlands: *Senembah Maatschappij N. V.* v. *Rupubliek Indonesie Bank Indonesia*, Nederlandse Jurisprudentie 1959, No. 73, p. 218 (Amsterdam Ct. App.), excerpts reprinted in Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305, 307–315 (1960).

Germany: *N. V. Verenigde Deli-Maatschapijen* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H.* (Bremen Ct. App.), excerpts reprinted in Domke, *supra*, at 313–314 (1960); Confiscation of Property of Sudeten Germans Case, [1948] Ann. Dig. 24, 25 (No. 12) (Amtsgericht of Dingolfing).

Japan: *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 305 (Dist. Ct. of Tokyo), aff'd, [1953] Int'l L. Rep. 312 (High Ct. of Tokyo).

Italy: *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 19 (Ct. of Venice); *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 23 (Civ. Ct. of Rome).

France: *Volatron* v. *Moulin*, [1938–1940] Ann. Dig. 24 (Ct. of App. of Aix); *Société Potasas Ibericas* v. *Nathan Bloch*, [1938–1940] Ann. Dig. 150 (Ct. of Cassation).

The Court does not refer to any country which has applied the act of state doctrine in a case where a substantial international law

I do not believe that the act of state doctrine, as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits.

I.

Prior decisions of this Court in which the act of state doctrine was deemed controlling do not support the assertion that foreign acts of state must be enforced or recognized or applied in American courts when they violate the law of nations. These cases do hold that a foreign act of state applied to persons or property within its borders may not be denied effect in our courts on the ground that it violates the public policy of the forum. Also the broad language in some of these cases does evince

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issue is sought to be raised by an alien whose property has been expropriated. This country and this Court stand alone among the civilized nations of the world in ruling that such an issue is not cognizable in a court of law.

The Court notes that the courts of both New York and Great Britain have articulated the act of state doctrine in broad language similar to that used by this Court in *Underhill* v. *Hernandez*, 168 U. S. 250, and from this it infers that these courts recognize no international law exception to the act of state doctrine. The cases relied on by the Court involved no international law issue. For in these cases the party objecting to the validity of the foreign act was a citizen of the foreign state. It is significant that courts of both New York and Great Britain, in apparently the first cases in which an international law issue was squarely posed, ruled that the act of state doctrine was no bar to examination of the validity of the foreign act. *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.): "[T]he Iranian Laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation." *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75, aff'd, 304 N. Y. 704, 107 N. E. 2d 604 (foreign expropriation of intangible property denied effect as contrary to New York public policy).

an attitude of caution and self-imposed restraint in dealing with the laws of a foreign nation. But violations of international law were either not presented in these cases, because the parties or predecessors in title were nationals of the acting state, or the claimed violation was insubstantial in light of the facts presented to the Court and the principles of international law applicable at the time.[2]

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[2] In one of the earliest decisions of this Court even arguably invoking the act of state doctrine, *Hudson* v. *Guestier*, 4 Cranch 293, Chief Justice Marshall held that the validity of a seizure by a foreign power of a vessel within the jurisdiction of the sentencing court could not be reviewed "unless the court passing the sentence loses its jurisdiction by some circumstance *which the law of nations can notice*." (Emphasis added.) *Underhill* v. *Hernandez*, 168 U. S. 250, where the Court stated the act of state doctrine in its oft-quoted form, was a suit in tort by an American citizen against an officer of the Venezuelan Government for an unlawful detention and compelled operation of the plaintiff's water facilities during the course of a revolution in that country. Well-established principles of immunity precluded the plaintiff's suit, and this was one of the grounds for dismissal. However, as noted above, the Court did invoke the act of state doctrine in dismissing the suit and arguably the forced detention of a foreign citizen posed a claim cognizable under international law. But the Court did not ignore this possibility of a violation of international law; rather in distinguishing cases involving arrests by military authorities in the absence of war and those concerning the right of revolutionary bodies to interfere with commerce, the Court passed on the merits of plaintiff's claim under international law and deemed the claim without merit under then existing doctrines. "[A]cts of *legitimate* warfare cannot be made the basis of individual liability." (Emphasis added.) 168 U. S., at 253. Indeed the Court cited *Dow* v. *Johnson*, 100 U. S. 158, a suit arising from seizures by American officers in the South during the Civil War, in which it was held without any reliance on the act of state doctrine that the law of nations precluded making acts of legitimate warfare a basis for liability after the cessation of hostilities, and *Ford* v. *Surget*, 97 U. S. 594, which held an officer of the Confederacy immune from damages for the destruction of property during the war. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, a case often invoked for the blanket prohibition of

These cases do not strongly imply or even suggest that the Court would woodenly apply the act of state doctrine and grant enforcement to a foreign act where the act was a clear and flagrant violation of international law,

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the act of state doctrine, held only that the antitrust laws did not extend to acts committed by a private individual in a foreign country with the assistance of a foreign government. Most of the language in that case is in response to the issue of how far legislative jurisdiction should be presumed to extend in the absence of an express declaration. The Court held that the ordinary understandings of sovereignty warranted the proposition that conduct of an American citizen should ordinarily be adjudged under the law where the acts occurred. Rather than ignoring international law, the law of nations was relied on for this rule of statutory construction.

More directly in point are the Mexican seizures passed upon in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co.*, 246 U. S. 304. In *Oetjen* the plaintiff claimed title from a Mexican owner who was divested of his property during the Mexican revolution. The terms of the expropriation are not clear, but it appears that a promise of compensation was made by the revolutionary government and that the property was to be used for the war effort. The only international law issue arguably present in the case was by virtue of a treaty of the Hague Convention, to which both Mexico and the United States were signatories, governing customs of war on land; although the Court did not rest the decision on the treaty, it took care to point out that this seizure was probably lawful under the treaty as a compelled contribution in time of war for the needs of the occupying army. Moreover, the Court stressed the fact that the title challenged was derived from a Mexican law governing the relations between the Mexican Government and Mexican citizens. Aside from the citizenship of the plaintiff's predecessor in title, the property seized was to satisfy an assessment of the revolutionary government which the Mexican owner had failed to pay. It is doubtful that this measure, even as applied to non-Mexicans, would constitute a violation of international law. *Dow* v. *Johnson, supra.* In *Ricaud* the titleholder was an American and the Court deemed this difference irrelevant "for the reasons given" in *Oetjen.* In *Ricaud* there was a promise to pay for the property seized during the revolution upon the cessation of

as the District Court and the Court of Appeals have found in respect to the Cuban law challenged herein. 193 F. Supp. 375, aff'd, 307 F. 2d 845.

II.

Though not a principle of international law, the doctrine of restraint, as formulated by this Court, has its roots in sound policy reasons, and it is to these we must turn to decide whether the act of state doctrine should

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hostilities and the seizure was to meet exigencies created by the revolution, which was permissible under the provisions of the Hague Convention considered in *Oetjen*. This declaration of legality in the Hague Convention, and the international rules of war on seizures, rendered the allegation of an international law violation in *Ricaud* sufficiently frivolous so that consideration on the merits was unnecessary. The sole question presented in *Shapleigh* v. *Mier*, 299 U. S. 468, concerned the legality of certain action under Mexican law, and the parties expressly declined to press the question of legality under international law. And the Court's language in that case—"For wrongs of that order the remedy to be followed is along the channels of diplomacy"—must be read against the background of an arbitral claims commission that had been set up to determine compensation for claimants in the position of Shapleigh, the existence of which the Court was well aware. "[A] tribunal is in existence, the International Claims Commission, established by convention between the United States and Mexico, to which the plaintiffs are at liberty to submit and have long ago submitted a claim for reparation." 299 U. S., at 471.

In the other cases cited in the Court's opinion, *ante*, pp. 416–417, the act of state doctrine was not even peripherally involved; the law applicable in both *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203, was a compact between the United States and Russia regarding the effect of Russian nationalization decrees on property located in the United States. No one seriously argued that the act of state doctrine precludes reliance on a binational compact dealing with the effect to be afforded or denied a foreign act of state.

be extended to cover wrongs cognizable under international law.

Whatever may be said to constitute an act of state,[3] our decisions make clear that the doctrine of nonreview ordinarily applies to foreign laws affecting tangible property located within the territory of a government which is recognized by the United States. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304. This judicially fashioned doctrine of nonreview is a corollary of the principle that ordinarily a state has jurisdiction to prescribe the rules governing the title to property within its territorial sovereignty, see *Clarke* v. *Clarke*, 178 U. S. 186; *De Vaughn* v. *Hutchinson*, 165 U. S. 566, a principle reflected in the conflict of laws rule, adopted in virtually all nations, that the *lex loci* is the law governing title to property.[4] This conflict rule would have been enough in itself to have controlled the outcome of most of the act of state cases decided by this Court. Both of these rules rest on the deeply imbedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has

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[3] An act of state has been said to be any governmental act in which the sovereign's interest qua sovereign is involved. "The expression 'act of State' usually denotes 'an executive or administrative exercise of sovereign power by an independent State or potentate, or by its or his duly authorized agents or officers.' The expression, however, is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior Court." Mann, The Sacrosanctity of the Foreign Act of State, 59 L. Q. Rev. 42 (1943).

[4] IV Rabel, The Conflict of Laws: A Comparative Study, 30–69 (1958); Ehrenzweig, Conflict of Laws, 607–633 (1962); Rest. (2d ed.) Conflict of Laws, § 254a (Tent. Draft No. 5 (1959)); Baade, Indonesian Nationalization Measures Before Foreign Courts—A Reply, 54 Am. J. Int'l L. 801 (1960); Re, Foreign Confiscations in Anglo-American Law—A Study of the "Rule of Decision" Principle, 49–50 (1951).

been characterized as the touchstone of private and public international law.[5] That the act of state doctrine is rooted in a well-established concept of international law is evidenced by the practice of other countries. These countries, without employing any act of state doctrine, afford substantial respect to acts of foreign states occurring within their territorial confines.[6] Our act of state doctrine, as formulated in past decisions of the Court, carries the territorial concept one step further. It precludes a challenge to the validity of foreign law on the ordinary conflict of laws ground of repugnancy to the public policy of the forum. Against the objection that the foreign act violates domestic public policy, it has been said that the foreign law provides the rule of decision, where the *lex loci* rule would so indicate, in American courts. *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C. A. 2d Cir.); *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. 2d 798; *McCarthy* v. *Reichsbank*, 259 App. Div. 1016, 20 N. Y. S. 2d 450, aff'd, 284 N. Y. 739, 31 N. E. 2d 508. But cf. *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App.

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[5] See generally, Kaplan and Katzenbach, The Political Foundations of International Law, 135–172 (1961); Herz, International Politics in the Atomic Age, 58–62 (1959).

[6] *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha*, [1953] Int'l L. Rep. 305 (Dist. Ct. of Tokyo), aff'd, [1953] Int'l L. Rep. 312 (High Ct. of Tokyo); *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 19 (Ct. of Venice (1953)); *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 23, 39–43 (Civ. Ct. of Rome); compare *N. V. Verenigde Deli-Maatschapijen* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft* m. b. H. (Bremen Ct. App.), excerpts reprinted in Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305, 313–314 (1960), with Confiscation of Property of Sudeten Germans Case, [1948] Ann. Dig. 24, 25 (No. 12) (Amtsgericht of Dingolfing) (discriminatory confiscatory decrees). See also *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K. B. 391.

Div. 528, 111 N. Y. S. 2d 75, aff'd, 304 N. Y. 704, 107 N. E. 2d 604. See also *Perutz* v. *Bohemian Discount Bank*, 304 N. Y. 533, 537, 110 N. E. 2d 6, 7.

The reasons that underlie the deference afforded to foreign acts affecting property in the acting country are several; such deference reflects an effort to maintain a certain stability and predictability in transnational transactions, to avoid friction between nations, to encourage settlement of these disputes through diplomatic means and to avoid interference with the executive control of foreign relations. To adduce sound reasons for a policy of nonreview is not to resolve the problem at hand, but to delineate some of the considerations that are pertinent to its resolution.

Contrary to the assumption underlying the Court's opinion, these considerations are relative, their strength varies from case to case, and they are by no means controlling in all litigation involving the public acts of a foreign government. This is made abundantly clear by numerous cases in which the validity of a foreign act of state is drawn in question and in which these identical considerations are present in the same or a greater degree. American courts have denied recognition or effect to foreign law, otherwise applicable under the conflict of laws rules of the forum, to many foreign laws where these laws are deeply inconsistent with the policy of the forum, notwithstanding that these laws were of obvious political and social importance to the acting country. For example, foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States uniformly have been denied effect in our courts, including this Court; [7]

[7] *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286, 20 N. E. 2d 758 (1939), aff'd *sub nom. United States* v. *Moscow Fire Ins. Co.*, 309 U. S. 624; *Vladikavkazsky R. Co.* v. *New York Trust*

courts continued to recognize private property rights of Russian corporations owning property within the United States long after the Russian Government, recognized by the United States, confiscated all such property and had rescinded the laws on which corporate identity depended.[8] Furthermore, our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign.[9] And the judgments of

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Co., 263 N. Y. 369, 189 N. E. 456; *Plesch* v. *Banque Nationale de la Republique D'Haiti*, 273 App. Div. 224, 77 N. Y. S. 2d 43, aff'd, 298 N. Y. 573, 81 N. E. 2d 106; *Bollack* v. *Societe Generale*, 263 App. Div. 601, 33 N. Y. S. 2d 986; *Latvian State Cargo & Passenger S. S. Line* v. *McGrath*, 88 U. S. App. D. C. 226, 188 F. 2d 1000.

[8] *Second Russian Ins. Co.* v. *Miller*, 297 F. 404 (C. A. 2d Cir.); *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369; *Sokoloff* v. *National City Bank*, 239 N. Y. 158, 145 N. E. 917; *A/S Merilaid & Co.* v. *Chase Nat'l Bank*, 189 Misc. 285, 71 N. Y. S. 2d 377 (Sup. Ct. N. Y.). See also *Compania Ron Bacardi* v. *Bank of Nova Scotia*, 193 F. Supp. 814 (D. C. S. D. N. Y.) (normal conflict of laws rule superseded by a national policy against recognition of Cuban confiscatory decrees).

Similarly, it has been held that nationalization of shares of a foreign corporation or partnership owning property in the United States will not affect the title of former shareholders or partners; the prior owners are deemed to retain their equitable rights in assets located in the United States. *Vladikavkazsky R. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456. The acts of a belligerent occupant of a friendly nation in respect to contracts made within the occupied nation have been denied application in our courts. *Aboitiz & Co.* v. *Price*, 99 F. Supp. 602 (D. C. Utah). Compare *Werfel* v. *Zivnostenska Banka*, 260 App. Div. 747, 752, 23 N. Y. S. 2d 1001, 1005.

[9] See the recent affirmation of this doctrine in *Banco do Brasil, S. A.*, v. *Israel Commodity Co.*, holding that an action by Brazil against a New York coffee importer for fraudulently circumventing Brazilian foreign exchange regulations by forging documents in New York was contrary to New York public policy, notwithstanding that the Bretton Woods agreement, to which both the United States and

foreign courts are denied conclusive or prima facie effect where the judgment is based on a statute unenforceable in the forum, where the procedures of the rendering court markedly depart from our notions of fair procedure, and generally where enforcement would be contrary to the public policy of the forum.[10] These rules demonstrate that our courts have never been bound to pay unlimited deference to foreign acts of state, defined as an act or law in which the sovereign's governmental interest is involved; they simultaneously cast doubt on the proposition that the additional element in the case at bar, that the property may have been within the territorial confines of Cuba when the expropriation decree was promul-

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Brazil are parties, expresses a policy favorable to such exchange laws. 12 N. Y. 2d 371, 190 N. E. 2d 235, cert. denied, 376 U. S. 906. See also *The Antelope*, 10 Wheat. 66, 123; *Huntington* v. *Attrill*, 146 U. S. 657; *Moore* v. *Mitchell*, 30 F. 2d 600, aff'd on other grounds, 281 U. S. 18; Dicey, Conflict of Laws (Morris ed., 7th ed. 1958), 667; Wolff, Private International Law (2d ed. 1950), 525.

[10] *Hilton* v. *Guyot*, 159 U. S. 113 (lack of reciprocity in the foreign state renders the judgment only prima facie evidence of the justice of the plaintiff's claim); cf. *Venezuelan Meat Export Co.* v. *United States*, 12 F. Supp. 379 (D. C. D. Md.); *The W. Talbot Dodge*, 15 F. 2d 459 (D. C. S. D. N. Y.) (fraud is a defense to the enforcement of foreign judgments); *Title Ins. & Trust Co.* v. *California Development Co.*, 171 Cal. 173, 152 P. 542 (fraud); *Banco Minero* v. *Ross*, 106 Tex. 522, 172 S. W. 711 (procedure of Mexican court offensive to natural justice); *De Brimont* v. *Penniman*, 7 Fed. Cas. 309, No. 3,715 (C. C. S. D. N. Y.) (judgment founded on a cause of action contrary to the "policy of our law, and does violence to what we deem the rights of our own citizen"); other cases indicate that American courts will refuse enforcement where protection of American citizens or institutions requires re-examination. *Williams* v. *Armroyd*, 7 Cranch 423; *MacDonald* v. *Grand Trunk R. Co.*, 71 N. H. 448, 52 A. 982; *Caruso* v. *Caruso*, 106 N. J. Eq. 130, 148 A. 882; *Hohner* v. *Gratz*, 50 F. 369 (C. C. S. D. N. Y.) (alternative holding). See generally Reese, The Status In This Country of Judgments Rendered Abroad, 50 Col. L. Rev. 783 (1950).

gated, requires automatic deference to the decree, regardless of whether the foreign act violates international law.[11]

III.

I start with what I thought to be unassailable propositions: that our courts are obliged to determine contro-

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[11] The Court attempts to distinguish between these foreign acts on the ground that all foreign penal and revenue and perhaps other public laws are irrebuttably presumed invalid to avoid the embarrassment stemming from examination of some acts and that all foreign expropriations are presumed valid for the same reason. This distinction fails to explain why it may be more embarrassing to refuse recognition to an extraterritorial confiscatory law directed at nationals of the confiscating state than it would be to refuse effect to a territorial confiscatory law. From the viewpoint of the confiscating state, the need to affect property beyond its borders may be as significant as the need to take title to property within its borders. And it would appear more offensive to notions of sovereignty for an American court to deny enforcement of a foreign law because it is deemed contrary to justice, morals, or public policy, than to deny enforcement because of principles of international law. It will not do to say that the foreign state has no jurisdiction to affect title to property beyond its borders, since other jurisdictional bases, such as citizenship, are invariably present. But for the policy of the forum state, doubtless the foreign law would be given effect under ordinary conflict of laws principles. Compare *Sokoloff* v. *National City Bank*, 239 N. Y. 158, 145 N. E. 917; *Second Russian Ins. Co.* v. *Miller*, 297 F. 404 (C. A. 2d Cir.) with *Werfel* v. *Zivnostenska Banka*, 260 App. Div. 747, 23 N. Y. S. 2d 1001.

The refusal to enforce foreign penal and tax laws and foreign judgments is wholly at odds with the presumption of validity and requirement of enforcement under the act of state doctrine; the political realms of the acting country are clearly involved, the enacting country has a large stake in the decision, and when enforcement is against nationals of the enacting country, jurisdictional bases are clearly present. Moreover, it is difficult, conceptually or otherwise, to distinguish between the situation where a tax judgment secured in a foreign country against one who is in the country at the time of judgment is presented to an American court and the situation where a confiscatory decree is sought to be enforced in American courts.

versies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law.

Article III, § 2, of the Constitution states that "[t]he judicial Power shall extend to all Cases . . . affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." And § 1332 of the Judicial Code gives the courts jurisdiction over all civil actions between citizens of a State and foreign states or citizens or subjects thereof. The doctrine that the law of nations is a part of the law of the land, originally formulated in England and brought to America as part of our legal heritage, is reflected in the debates during the Constitutional Convention [12] and in the Constitution itself.[13] This Court has time and again

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[12] For the extent to which the Framers contemplated the application of international law in American courts and their concern that this body of law be administered uniformly in the federal courts, see The Federalist: No. 3, at 22, by John Jay (Bourne ed. 1947, Book I); No. 80, at 112 and 114; No. 83, at 144, and No. 82, by Alexander Hamilton (Bourne ed. 1947, Book II); No. 42, by James Madison (Bourne ed. 1947, Book I).

Thomas Jefferson, speaking as Secretary of State, wrote to M. Genet, French Minister, in 1793: "The law of nations makes an integral part . . . of the laws of the land." I Moore, Digest of International Law (1906), 10. And see the opinion of Attorney General Randolph given in 1792: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Op. Atty. Gen. 27. Also see Warren, The Making of the Constitution, Pt. II, c. I, at 116; Madison's Notes in 1 Farrand 21, 22, 244, 316. See generally Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. of Pa. L. Rev. 26 (1952).

[13] This intention was reflected and implemented in the Articles of the Constitution. Article I, § 8, empowers the Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and

effectuated the clear understanding of the Framers, as embodied in the Constitution, by applying the law of nations to resolve cases and controversies.[14] As stated in *The Paquete Habana*, 175 U. S. 677, 700, "[i]nternational law

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Offences against the Law of Nations." Article III, § 2, extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[14] As early as 1793, Chief Justice Jay stated in *Chisholm* v. *Georgia* that "Prior . . . to that period [the date of the Constitution], the United States had, by taking a place among the nations of the earth, become amenable to the law of nations." 2 Dall. 419, at 474. And in 1796, Justice Wilson stated in *Ware* v. *Hylton:* "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." 3 Dall. 199, at 281. Chief Justice Marshall was even more explicit in *The Nereide*, when he said:

"If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land." 9 Cranch 388, at 423.

As to the effect such an Act of Congress would have on international law, the Court has ruled that an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. *MacLeod* v. *United States*, 229 U. S. 416, 434 (1913).

As was well stated in *Hilton* v. *Guyot:*

"International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within

is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Principles of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof. Fundamental fairness to litigants as well as the interest in stability of relationships and preservation of reasonable expectations call for their application whenever international law is controlling in a case or controversy.[15]

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the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations." 159 U. S. 113, 163 (1895).

For other cases which explicitly invoke the principle that international law is a part of the law of the land, see, for example: *Talbot* v. *Janson*, 3 Dall. 133, 161; *Respublica* v. *De Longchamps*, 1 Dall. 111, 116; *The Rapid*, 8 Cranch 155, 162; *Fremont* v. *United States*, 17 How. 542, 557; *United States* v. *Arjona*, 120 U. S. 479.

[15] Among others, international law has been relied upon in cases concerning the acquisition and control of territory, *Jones* v. *United States*, 137 U. S. 202; *Mormon Church* v. *United States*, 136 U. S. 1; *Dorr* v. *United States*, 195 U. S. 138; the resolution of boundary disputes, *Iowa* v. *Illinois*, 147 U. S. 1; *Arkansas* v. *Tennessee*, 246 U. S. 158; questions of nationality, *United States* v. *Wong Kim Ark*, 169 U. S. 649; *Inglis* v. *The Trustees of the Sailor's Snug Harbour*, 3 Pet.

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The relevance of international law to a just resolution of this case is apparent from the impact of international law on other aspects of this controversy. Indeed it is only because of the application of international rules to resolve other issues that the act of state doctrine becomes the determinative issue in this case. The basic rule that the law of the situs of property is the proper law to be applied in determining title in other forums, whether styled a rule of private international law or domestic conflict of law, is rooted in concepts firmly embedded in a consensus of nations on territorial sovereignty. Without such a consensus and the conflict of laws rule derived therefrom, the question of whether Cuba's decree can be measured against the norms of international law would never arise in this litigation, since then a court presumably would be free to apply its own rules governing the acquisition of title to property. Furthermore, the contention that the sugar in question was within the territorial confines of Cuba when the Cuban decree was enacted itself rests on widely accepted principles of international law, namely, that the bays or inlets contiguous to a country are within its boundaries and that territorial jurisdiction extends at least three miles beyond these boundaries. See Oppenheim, International Law, §§ 186, 190–191 (Lauterpacht, 8th ed. 1955). Without these rules derived from international law, this confiscation could be characterized as extraterritorial and therefore—unless the Court also intends to change this rule—subject to the public policy test traditionally applied to extraterritorial takings of property, even though embarrassing to foreign affairs. Further, in response to the contention

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99; principles of war and neutrality and their effect on private rights, *The Steamship Appam*, 243 U. S. 124; *Dow* v. *Johnson*, 100 U. S. 158; *Ford* v. *Surget*, 97 U. S. 594; and private property rights generally, *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116; *United States* v. *Percheman*, 7 Pet. 51.

that title to the sugar had already passed to Farr, Whitlock by virtue of the contract with C. A. V. when the nationalization decree took effect, it was held below that under *"the law merchant common to civilized countries"* (emphasis supplied) Farr, Whitlock could not acquire title to the shipment until payment was made in New York. Thus the central issue in this litigation is posed only because of numerous other applications of the law of nations and domestic rules derived therefrom in respect to subsidiary, but otherwise controlling, legal issues in the controversy.

The Court accepts the application of rules of international law to other aspects of this litigation, accepts the relevance of international law in other cases and announces that when there is an appropriate degree of "consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Ante*, p. 428. The Court then, rather lightly in my view, dispenses with its obligation to resolve controversies in accordance with "international justice" and the "national interest" by assuming and declaring that there are no areas of agreement between nations in respect to expropriations. There may not be. But without critical examination, which the Court fails to provide, I would not conclude that a confiscatory taking which discriminates against nationals of another country to retaliate against the government of that country falls within that area of issues in international law "on which opinion seems to be so divided." Nor would I assume, as the ironclad rule of the Court necessarily implies, that there is not likely to be a consensus among nations in this area, as for example upon the illegality of discriminatory takings of alien property based upon race,

religion or nationality.[16] But most of all I would not declare that even if there were a clear consensus in the international community, the courts must close their eyes to a lawless act and validate the transgression by rendering judgment for the foreign state at its own request. This is an unfortunate declaration for this Court to make. It is, of course, wholly inconsistent with the premise from which the Court starts, and, under it, banishment of international law from the courts is complete and final in cases like this. I cannot so cavalierly ignore the obligations of a court to dispense justice to the litigants before it.[17]

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[16] "[D]iscriminatory laws enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specified social or political groups . . . run counter to the internationally accepted principle of the equality of individuals before the law." *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, [1955] Int'l L. Rep. 23, 40 (Civ. Ct. of Rome); see also Friedman, Expropriation In International Law (1953), 189–192; Wortley, Expropriation In Public International Law, 120–121 (1959); Cheng, The Rationale of Compensation for Expropriation, 44 Grotius Society 267, 281, 289 (1959); Seidl-Hohenveldern, Title to Confiscated Foreign Property and Public International Law, 56 Am. J. Int'l L. 507, 509–510 (1962).

[17] In the only reference in the Court's opinion to fairness between the litigants, and a court's obligation to resolve disputes justly, *ante*, p. 435, the Court quickly disposes of this consideration by assuming that the typical act of state case is between an original owner and an "innocent" purchaser, so that it is not unjust to leave the purchaser's title undisturbed by applying the act of state doctrine. Beside the obvious fact that this assumption is wholly inapplicable to the case where the foreign sovereign itself or its agent seeks to have its title validated in our courts—the case at bar—it is far from apparent that most cases represent suits between the original owner and an innocent purchaser. The "innocence" of a purchaser who buys goods from a government with knowledge that possession or apparent title was derived from an act patently in violation of international law is highly questionable. More fundamentally, doctrines of commercial law designed to protect the title of a bona fide purchaser can serve to resolve this question without reliance upon a broad irrebuttable presumption of validity.

IV.

The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistently with rules of international law, including those rules which mark the bounds of lawful state action against aliens or their property located within the territorial confines of the foreign state. Although a state may reasonably expect that the validity of its laws operating on property within its jurisdiction will not be defined by local notions of public policy of numerous other states (although a different situation may well be presented when courts of another state are asked to lend their enforcement machinery to effectuate the foreign act),[18] it cannot with impunity ignore the rules governing the conduct of all nations and expect that other nations and tribunals will view its acts as within the permissible scope of territorial sovereignty. Contrariwise, to refuse inquiry into the question of whether norms of the international community have been contravened by the act of state under review would seem to deny the existence or purport of such norms, a view that seems inconsistent with the role of international law in ordering the relations between nations. Finally, the impartial application of international law would not only be an

[18] Another situation was also presented by the Nazi decrees challenged in the *Bernstein* litigation; these racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity. The acts could thus be measured in local courts against widely held principle rather than judged by the parochial views of the forum.

affirmation of the existence and binding effect of international rules of order, but also a refutation of the notion that this body of law consists of no more than the divergent and parochial views of the capital importing and exporting nations, the socialist and free-enterprise nations.

The Court puts these considerations to rest with the assumption that the decisions of the courts "of the world's major capital exporting country and principal exponent of the free enterprise system" would hardly be accepted as impartial expressions of sound legal principle. The assumption, if sound, would apply to any other problem arising from transactions that cross state lines and is tantamount to a declaration excusing this Court from any future consequential role in the clarification and application of international law. See *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 363. This declaration ignores the historic role which this Court and other American courts have played in applying and maintaining principles of international law.

Of course, there are many unsettled areas of international law, as there are of domestic law, and these areas present sensitive problems of accommodating the interests of nations that subscribe to divergent economic and political systems. It may be that certain nationalizations of property for a public purpose fall within this area. Also, it may be that domestic courts, as compared to international tribunals, or arbitral commissions, have a different and less active role to play in formulating new rules of international law or in choosing between rules not yet adhered to by any substantial group of nations. Where a clear violation of international law is not demonstrated, I would agree that principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act. But none of these considerations relieve a court of the obligation to make an

inquiry into the validity of the foreign act, none of them warrant a flat rule of no inquiry at all. The vice of the act of state doctrine as formulated by the Court and applied in this case, where the decree is alleged not only to be confiscatory but also retaliatory and discriminatory and has been found by two courts to be a flagrant violation of international law, is that it precludes any such examination and proscribes any decision on whether Cuban Law No. 851 contravenes an accepted principle of international law.

The other objections to reviewing the act challenged herein, save for the alleged interference with the executive's conduct of foreign affairs, seem without substance, both in theory and as applied to the facts of the instant case. The achievement of a minimum amount of stability and predictability in international commercial transactions is not assured by a rule of nonreviewability which permits any act of a foreign state, regardless of its validity under international law, to pass muster in the courts of other states. The very act of a foreign state against aliens which contravenes rules of international law, the purpose of which is to support and foster an order upon which people can rely, is at odds with the achievement of stability and predictability in international transactions. And the infrequency of cases in American courts involving foreign acts of state challenged as invalid under international law furnishes no basis at all for treating the matter as unimportant and for erecting the rule the Court announces today.[19]

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[19] The Court argues that an international law exception to the act of state doctrine would fail to deter violations of international law, since judicial intervention would at best be sporadic. At the same time, proceeding on a contradictory assumption as to the impact of such an exception, the Court argues that the exception would render titles uncertain and upset the flow of international trade. The Court attempts to reconcile these conclusions by distinguishing between

There is also the contention that the act of state doctrine serves to channel these disputes through the processes designed to rectify wrongs of an international magnitude, see *Oetjen* v. *Central Leather Co., supra; Shapleigh* v. *Mier, supra.* The result of the doctrine, it is said, requires an alien to seek relief in the courts or through the executive of the expropriating country, to seek relief through diplomatic channels of his own country and to seek review in an international tribunal. These are factors an American court should consider when asked to examine a foreign act of state, although the availability and effectiveness of these modes of accommodation may more often be illusory than real. Where alternative modes are available and are likely to be effective, our courts might well stay their hand and direct a litigant to exhaust or attempt to utilize them before adjudicating the validity of the foreign act of state. But the possibility of alternative remedies, without more, is frail support for a rule of automatic deference to the foreign act in all cases. The Court's rule is peculiarly inappropriate in the instant case, where no one has argued that C. A. V. can obtain relief in the courts of Cuba, where the United States has broken off diplomatic relations with Cuba, and

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"direct" and "indirect" impacts of a declaration of invalidity, and by assuming that the exporting nation need only find other buyers for its products at the same price. From the point of view of the exporting nation, the distinction between indirect and direct impact is meaningless, and the facile assumption that other buyers at the same price are available and the further unstated assumption that purchase price is the only pertinent consideration to the exporting country are based on an oversimplified view of international trade.

There is no evidence that either the absence of an act of state doctrine in the law of numerous European countries or the uncertainty of our own law on this question until today's decision has worked havoc with titles in international commerce or presented the nice questions the Court sets out on p. 434, n. 39, *ante*, or has substantially affected the flow of international commerce.

where the United States, although protesting the illegality of the Cuban decrees, has not sought to institute any action against Cuba in an international tribunal.

V.

There remains for consideration the relationship between the act of state doctrine and the power of the executive over matters touching upon the foreign affairs of the Nation. It is urged that the act of state doctrine is a necessary corollary of the executive's authority to direct the foreign relations of the United States and accordingly any exception in the doctrine, even if limited to clear violations of international law, would impede or embarrass the executive in discharging his constitutional responsibilities. Thus, according to the Court, even if principles of comity do not preclude inquiry into the validity of a foreign act under international law, due regard for the executive function forbids such examination in the courts.

Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive.[20] But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question. International law, as well as a treaty or executive agree-

[20] These issues include whether a foreign state exists or is recognized by the United States, *Gelston* v. *Hoyt*, 3 Wheat. 246; *The Sapphire*, 11 Wall. 164, 168; the status that a foreign state or its representatives shall have in this country (sovereign immunity), *Ex parte Muir*, 254 U. S. 522; *Ex parte Peru*, 318 U. S. 578; the territorial boundaries of a foreign state, *Jones* v. *United States*, 137 U. S. 202; and the authorization of its representatives for state-to-state negotiation, *Ex parte Hitz*, 111 U. S. 766; *In re Baiz*, 135 U. S. 403.

ment, see *United States* v. *Pink*, 315 U. S. 203, provides an ascertainable standard for adjudicating the validity of some foreign acts, and courts are competent to apply this body of law, notwithstanding that there may be some cases where comity dictates giving effect to the foreign act because it is not clearly condemned under generally accepted principles of international law. And it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or States, aliens and aliens, and foreign states and American citizens or States.

A valid statute, treaty or executive agreement could, I assume, confine the power of federal courts to review or award relief in respect of foreign acts or otherwise displace international law as the rule of decision. I would not disregard a declaration by the Secretary of State or the President that an adjudication in the courts of the validity of a foreign expropriation would impede relations between the United States and the foreign government or the settlement of the controversy through diplomatic channels. But I reject the presumption that these undesirable consequences would follow from adjudication in every case, regardless of the circumstances. Certainly the presumption is inappropriate here.

Soon after the promulgation of Cuban Law No. 851, the State Department of the United States delivered a note of protest to the Cuban Government declaring this nationalization law to be in violation of international law.[21] Since the nationalization of the property in ques-

[21] "[T]he Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory." Press Release No. 397, Dept. of State, July 16, 1960.

[*Footnote 21 continued on p. 463*]

tion, the United States has broken off diplomatic relations with the present Government of Cuba. And in response to inquiries by counsel for the respondent in the instant case, officials of the State Department nowhere alleged that adjudication of the validity of the Cuban decree nationalizing C. A. V. would embarrass our relations with Cuba or impede settlement on an international level. In 1963, the United States Government issued a freeze order on all Cuban assets located in the United States. On these facts—although there may be others of which we are not aware—it is wholly unwarranted to assume that an examination of the validity of Cuban Law No. 851 and a finding of invalidity would intrude upon the relations between the United States and Cuba.

But the Court is moved by the spectre of another possibility; it is said that an examination of the validity of the Cuban law in this case might lead to a finding that the Act is not in violation of widely accepted international norms or that an adjudication here would require a similar examination in other more difficult cases, in one of which it would be found that the foreign law is not in breach of international law. The finding, either in this case or subsequent ones, that a foreign act does not violate widely accepted international principles, might differ from the executive's view of the act and international law, might thereby seriously impede the executive's functions in negotiating a settlement of the controversy and would therefore be inconsistent with the national interest. "[T]he very expression of judicial

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The United States Ambassador to Cuba condemned this decree, stating to the Cuban Ministry of Foreign Relations:

"Under instructions from my government, I wish to express to Your Excellency the indignant protest of my government against this resolution and its effects upon the legitimate rights which American citizens have acquired under the laws of Cuba and under International Law." Press Release No. 441, Dept. of State, Aug. 9, 1960.

uncertainty might provide embarrassment to the Executive Branch." *Ante*, p. 433. These speculations, founded on the supposed impact of a judicial decision on diplomatic relations, seem contrary to the Court's view of the arsenal of weapons possessed by this country to make secure foreign investment and the "ample powers [of the political branches] to effect compensation," *ante*, p. 436, and wholly inconsistent with its view of the limited competence and knowledge of the judiciary in the area of foreign affairs and diplomacy. Moreover, the expression of uncertainty feared by the Court is inevitable under the Court's approach, as is well exemplified by the *ex-cathedra* pronouncements in the instant case. While premising that a judicial expression of uncertainty on whether a particular act clearly violates international law would be embarrassing to the executive, this Court, in this very case, announces as an underpinning of its decision that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens," and proceeds to demonstrate the absence of international standards by cataloguing the divergent views of the "capital exporting," "free enterprise" nations, of the "newly independent and underdeveloped countries," and of the "Communist countries" toward both the issue of expropriation and international law generally. The act of state doctrine formulated by the Court bars review in this case and will do so in all others involving expropriation of alien property precisely because of the lack of a consensus in the international community on rules of law governing foreign expropriations.[22] Contrariwise, it

[22] The Court disclaims saying that there is no governing international standard in this area, but only that the matter is not meet for adjudication. *Ante*, p. 429, n. 26. But since the Court's view is that there are only the divergent views of nations that subscribe to different ideologies and practical goals on "expropriations," the matter

would seem that the act of state doctrine will not apply to a foreign act if it concerns an area in which there is unusual agreement among nations, *ante*, p. 428, which is not the case with the broad area of expropriations.[23] I fail to see how greater embarrassment flows from saying that the foreign act does not violate clear and widely accepted principles of international law than from saying, as the Court does, that nonexamination and validation are required because there are no widely accepted principles to which to subject the foreign act.[24] As to potential

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is not meet for adjudication, according to the Court, because of the lack of any agreement among nations on standards governing expropriations, *i. e.*, there is no international law in this area, but only the political views of the political branches of the various nations.

These assertions might find much more support in the authorities relied on by the Court and others if the issue under discussion was not the undefined category—expropriation—but the clearly discrete issue of adequate and effective compensation. It strains credulity to accept the proposition that newly emerging nations or their spokesmen denounce all rules of state responsibility—reject international law in regard to foreign nationals generally—rather than reject the traditional rule of international law requiring prompt, adequate, and effective compensation.

[23] There is another implication in the Court's opinion: the act of state doctrine applies to all expropriations, not only because of the lack of a consensus among nations on any standards but because the issue of validity under international law "touches . . . the practical and ideological goals of the various members of the community of nations." If this statement means something other than that there is no agreement on international standards governing expropriations, it must mean that the doctrine applies because the issue is important politically to the foreign state. If this is what the Court means, the act of state doctrine has been expanded to unprecedented scope. No foreign act is subject to challenge where the foreign nation demonstrates that the act is in furtherance of its practical or ideological goals. What foreign acts would not be so characterized?

[24] "A refusal of courts to consider foreign acts of State in the light of the law of nations is not . . . merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the

embarrassment, the difference is semantic, but as to determining the issue on its merits and as to upholding a regime of law, the difference is vast.

There is a further possibility of embarrassment to the executive from the blanket presumption of validity applicable to all foreign expropriations, which the Court chooses to ignore, and which, in my view, is far more self-evident than those adduced by the Court. That embarrassment stems from the requirement that all courts, including this Court, approve, validate, and enforce any foreign act expropriating property, at the behest of the foreign state or a private suitor, regardless of whether the act arbitrarily discriminates against aliens on the basis of race, religion, or nationality, and regardless of the position the executive has taken in respect to the act. I would think that an adjudication by this Court that the foreign act, as to which the executive is protesting and attempting to secure relief for American citizens, is valid and beyond question enforcible in the courts of the United States would indeed prove embarrassing to the Executive Branch of our Government in many situations, much more so than a declaration of invalidity or a refusal to adjudicate the controversy at all. For the likelihood that validation and enforcement of a foreign act which is condemned by the executive will be inconsistent with national policy as well as the goals of the international community is great.[25] This result is precisely

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full protection of the United States courts, police and governmental agencies to commercial property transactions which are contrary to the minimum standard of civilized conduct . . . ." The Association of the Bar of the City of New York, Committee on International Law, A Reconsideration of the Act of State Doctrine In United States Courts (1959), 8.

[25] That embarrassment results from a rigid rule of act of state immunity is well demonstrated by the judicial enforcement of German racial decrees after the war. The pronouncements by United States courts that these decrees vest title beyond question was wholly

because the Court, notwithstanding its protestations to the contrary, *ante*, p. 428, has laid down "an inflexible and all-encompassing rule in this case." [26]

VI.

Obviously there are cases where an examination of the foreign act and declaration of invalidity or validity might

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at odds with the executive's official policy, embodied in representations to other governments, that property taken through racial decrees by the Nazi Government should be returned to the original owners and thus not be subject to reparation claims. Compare statements by Secretary of State Marshall, reprinted in 16 Dept. State Bull. 653, 793 (1947), with *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (C. A. 2d Cir.). This embarrassing divergence of governmental opinion was eliminated only after the executive intervened and requested the courts to adjudicate the matter on the merits. *Bernstein* v. *Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (C. A. 2d Cir.).

[26] It is difficult to reconcile the Court's statement that rules pertaining to expropriations are unsettled or unclear with the Court's pronounced desire to avoid making any statements on the proper or accepted principles of international law, lest it embarrass the executive, who may have a different view in respect to this particular expropriation or this particular expropriating country. Is not the Court's limitation of the act of state doctrine to the area of expropriations—based upon the uncertainty and fluidity of the governing law in this area—an admission that may prove to be embarrassing to the executive at some later date? And the very line-drawing that the Court stresses as potentially disruptive of the executive's conduct of foreign affairs is inevitable under the Court's approach, since subsequent cases not involving expropriations will require us to determine if the act of state doctrine applies and the Court's standard is the strength and clarity of the principles of international law thought to govern the issue. Again our view of the clarity of these principles and the extent to which they are really rules of international law may not be identical with the views of the Department of State. These are some of the inherent difficulties of establishing a rule of law on the basis of speculations about possible but unidentified embarrassment to the executive at some unknown and unknowable future date.

undermine the foreign policy of the Executive Branch and its attempts at negotiating a settlement for a nationalization of the property of Americans. The respect ordinarily due to a foreign state, as reflected in the decisions of this Court, rests upon a desire not to disturb the relations between countries and on a view that other means, more effective than piecemeal adjudications of claims arising out of a large-scale nationalization program of settling the dispute, may be available. Precisely because these considerations are more or less present, or absent, in any given situation and because the Department of our Government primarily responsible for the formulation of foreign policy and settling these matters on a state-to-state basis is more competent than courts to determine the extent to which they are involved, a blanket presumption of nonreview in each case is inappropriate and a requirement that the State Department render a determination after reasonable notice, in each case, is necessary. Such an examination would permit the Department to evaluate whether adjudication would "vex the peace of nations," whether a friendly foreign sovereign is involved, and whether settlement through diplomacy or through an international tribunal or arbitration is impending. Based upon such an evaluation, the Department may recommend to the court that adjudication should not proceed at the present time. Such a request I would accord considerable deference and I would not require a full statement of reasons underlying it. But I reject the contention that the recommendation itself would somehow impede the foreign relations of the United States or unduly burden the Department. The Court notes that "[a]dverse domestic consequences might flow from an official stand," by which I take it to mean that it might be politically embarrassing on the domestic front for the Department of State to interpose an objection

in a particular case which has attracted public attention. But an official stand is what the Department must take under the so-called *Bernstein* exception, which the Court declines to disapprove. Assuming that there is a difference between an express official objection to examination and the executive's refusal to relieve "the court from any constraint upon the exercise of its jurisdiction," it is not fair to allow the fate of a litigant to turn on the possible political embarrassment of the Department of State and it is not this Court's role to encourage or require nonexamination by bottoming a rule of law on the domestic public relations of the Department of State. The Court also rejects this procedure because it makes the examination of validity turn on an educated guess by the executive as to the probable result and such a guess might turn out to be erroneous. The United States in its brief has disclaimed any such interest in the result in these cases, either in the ultimate outcome or the determination of validity, and I would take the Government at its word in this matter, without second-guessing the wisdom of its view.

This is precisely the procedure that the Department of State adopted voluntarily in the situation where a foreign government seeks to invoke the defense of immunity in our courts.[27] If it is not unduly disruptive for

[27] The procedure was instituted as far back as *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), when a United States Attorney, on the initiative of the Executive Branch, entered an appearance in a case involving the immunity of a foreign vessel, and was further defined in *Ex parte Muir*, 254 U. S. 522, 533 (1921), when the Court stated that the request by the foreign suitor to the executive department was an acceptable and well-established manner of interposing a claim of immunity. Under the procedure outlined in *Muir* each of the contesting parties may raise the immunity issue by obtaining an official statement from the State Department, or by encouraging the executive to set forth appropriate suggestions

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the Department to determine whether to issue a certificate of immunity to a foreign government itself when it seeks one, a recommendation by the Department in cases where generally the sovereign is not a party can hardly be deemed embarrassing to our foreign relations. Moreover, such a procedure would be consonant with the obligation of courts to adjudicate cases on the merits except for reasons wholly sufficient in the particular case. As I understand it, the executive has not yet said that adjudication in this case would impede his functions in the premises; rather he has asked us to adopt a rule of law foreclosing inquiry into the subject unless the executive affirmatively allows the courts to adjudicate on the merits.

Where the courts are requested to apply the act of state doctrine at the behest of the State Department, it does not follow that the courts are to proceed to adjudicate the action without examining the validity of the foreign act under international law. The foreign relations considerations and potential of embarrassment to the executive inhere in examination of the foreign act and in the result following from such an examination, not in the matter of who wins. Thus, all the Department of State can legitimately request is nonexamination of the foreign act. It has no proper interest or authority in having courts decide a controversy upon anything less than all of the applicable law or to decide it in accordance with the executive's view of the outcome that best comports with the foreign or domestic affairs of the day. We are not dealing here with those cases where a court refuses to measure a foreign statute against public policy of the forum or against the fundamental law of the foreign

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to the Court through the Attorney General. See *Compania Espanola de Navegacion Maritima, S. A.*, v. *The Navemar*, 303 U. S. 68, 74. See generally Dickinson, The Law of Nations As National Law: "Political Questions," 104 U. of Pa. L. Rev. 451, 470–475 (1956).

state itself. In those cases the judicially created act of state doctrine is an aspect of the conflict of laws rules of the forum and renders the foreign law controlling. But where a court refuses to examine foreign law under principles of international law, which it is required to do, solely because the Executive Branch requests the court, for its own reasons, to abstain from deciding the controlling issue in the controversy, then in my view, the executive has removed the case from the realm of the law to the realm of politics, and a court must decline to proceed with the case. The proper disposition is to stay the proceedings until circumstances permit an adjudication or to dismiss the action where an adjudication within a reasonable time does not seem feasible. To do otherwise would not be in accordance with the obligation of courts to decide controversies justly and in accordance with the law applicable to the case.

It is argued that abstention in the case at bar would allow C. A. V. to retain possession of the proceeds from the sugar and would encourage wrongfully deprived owners to engage in devious conduct or "self-help" in order to compel the sovereign or one deriving title from it into the position of plaintiff. The short answer to this is that it begs the question; negotiation of the documents by Farr, Whitlock and retention of the proceeds by C. A. V. is unlawful if, but only if, Cuba acquired title to the shipment by virtue of the nationalization decree. This is the issue that cannot be decided in the case if deference to the State Department's recommendation is paid (assuming for the moment that such a recommendation has been made). Nor is it apparent that "self-help," if such it be deemed, in the form of refusing to recognize title derived from unlawful paramount force is disruptive of or contrary to a peaceful international order. Furthermore, a court has ample means at its disposal to prevent a party who has engaged in wrongful conduct from

setting up defenses which would allow him to profit from the wrongdoing. Where the act of state doctrine becomes a rule of judicial abstention rather than a rule of decision for the courts, the proper disposition is dismissal of the complaint or staying the litigation until the bar is lifted, regardless of who has possession of the property title to which is in dispute.

VII.

The position of the Executive Branch of the Government charged with foreign affairs with respect to this case is not entirely clear. As I see it no specific objection by the Secretary of State to examination of the validity of Cuba's law has been interposed at any stage in these proceedings, which would ordinarily lead to an adjudication on the merits. Disclaiming, rightfully, I think, any interest in the outcome of the case, the United States has simply argued for a rule of nonexamination in every case, which literally, I suppose, includes this one. If my view had prevailed I would have stayed further resolution of the issues in this Court to afford the Department of State reasonable time to clarify its views in light of the opinion. In the absence of a specific objection to an examination of the validity of Cuba's law under international law, I would have proceeded to determine the issue and resolve this litigation on the merits.

Syllabus.

BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, *v.* GREYHOUND CORPORATION.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 77. Argued February 17, 1964.—Decided March 23, 1964.

The National Labor Relations Board (NLRB) concluded, after hearing, that respondent and a firm under contract to clean and maintain certain bus terminals which respondent operated were joint employers of bus terminal maintenance employees who constituted an appropriate unit in which to hold a representation election pursuant to § 9 (c) of the National Labor Relations Act. The NLRB ordered an election but respondent filed suit to set aside the Board's decision and enjoin the election. Concluding that the NLRB's findings were legally insufficient to establish a joint employer relationship and that the NLRB had exceeded its powers, the District Court granted the injunction and the Court of Appeals affirmed. *Held:* The NLRB's orders in certification proceedings under § 9 (c) of the Act are not final orders made reviewable by §§ 10 (e) and (f). *Leedom* v. *Kyne*, 358 U. S. 184, distinguished. They can, however, become reviewable where an employer's refusal to bargain with a certified unit results in an unfair labor act charge being brought, in which case § 9 (d) of the Act indirectly provides for full judicial review of the underlying certification order. Pp. 474–482.

309 F. 2d 397, reversed and remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Herman M. Levy.*

Warren E. Hall, Jr. argued the cause and filed a brief for respondent.

I. J. Gromfine and *Herman Sternstein* filed a brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL–CIO, as *amicus curiae,* urging reversal.

Alexander E. Wilson, Jr. filed a brief for Floors, Inc., as *amicus curiae*, urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL–CIO (the Union) filed an amended petition with the National Labor Relations Board pursuant to § 9 (c) of the National Labor Relations Act,[1] requesting a representation election among the porters, janitors and maids working at four Florida bus terminals operated by the respondent (Greyhound). The amended petition designated the "employer" of the employees sought to be represented

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[1] Section 9 (c) of the National Labor Relations Act, as amended, 29 U. S. C. § 159 (c), provides in pertinent part:

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

as Greyhound and Floors, Inc. The latter, a corporation engaged in the business of providing cleaning, maintenance and similar services to various customers in Florida, had contracted with Greyhound to provide such services at the four terminals in question.

At the Board hearing on the petition, the Union contended alternatively that the unit requested was appropriate as a residual unit of all unrepresented Greyhound employees at the four terminals—on the ground that Greyhound was at least a joint employer with Floors of the employees—or that the unit was appropriate because the employees comprised a homogeneous, distinct group. Greyhound and Floors claimed that the latter was the sole employer of the employees, and that the appropriate bargaining unit should therefore encompass all Floors' employees, either in all four cities in which the terminals are located, or in separate groups.

The Board found that while Floors hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that Floors' supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that in at least one instance Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory. On this basis, the Board, with one member dissenting, concluded that Greyhound and Floors were joint employers, because they exercised common control over the employees, and that the unit consisting of all employees under the joint employer relationship was an appropriate unit in which to hold an election. The Board thereupon directed an election to determine whether the employees desired to be represented by the Union.

Shortly before the election was scheduled to take place, Greyhound filed this suit in the United States District Court for the Southern District of Florida, seeking to set aside the decision of the Board and to enjoin the pending election. After a hearing, the court entered an order permanently restraining the election. 205 F. Supp. 686. Concluding that it had jurisdiction on the basis of this Court's decision in *Leedom* v. *Kyne*, 358 U. S. 184, the court held on the merits that the Board's findings were insufficient as a matter of law to establish a joint employer relationship, that those findings established, as a matter of law, that Floors was the sole employer of the employees in question, and that the Board had therefore violated the National Labor Relations Act by attempting to conduct a representation election where no employment relationship existed between the employees and the purported employer. The Court of Appeals affirmed, 309 F. 2d 397, and we granted certiorari to consider a seemingly important question of federal labor law. 372 U. S. 964. We reverse the judgment of the Court of Appeals.

Both parties agree that in the normal course of events Board orders in certification proceedings under § 9 (c) are not directly reviewable in the courts. This Court held as long ago as *American Federation of Labor* v. *Labor Board*, 308 U. S. 401, that the "final order[s]" made reviewable by §§ 10 (e) and (f)[2] in the Courts of

[2] Section 10 of the National Labor Relations Act, as amended, 29 U. S. C. § 160, provides in pertinent part:

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . [*Footnote 2 continued on p. 477*]

Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, § 9 (d) of the Act makes full provision for judicial review of the underlying certification order by providing that "such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed" in the Court of Appeals.[3]

That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress ex-

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"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside."

[3] Section 9 (d) of the National Labor Relations Act, 29 U. S. C. § 159 (d), provides in pertinent part:

"Whenever an order of the Board made pursuant to section 160 (e) . . . is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) . . . , and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

plicitly intended to impose precisely such delays. At the time of the original passage of the National Labor Relations Act in 1935, the House Report clearly delineated the congressional policy judgment which underlay the restriction of judicial review to that provided for in § 9 (d):

> "When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review." [4]

And both the House [5] and the Senate Reports [6] spelled out the thesis, repeated on the floor, that the purpose of

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[4] H. R. Rep. No. 972, 74th Cong., 1st Sess., 5.

[5] ". . . Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and 10 (c)." H. R. Rep. No. 972, 74th Cong., 1st Sess., 20–21. [*Footnote 6 is on p. 479*]

§ 9 (d) was to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election." [7] Congressional determination to restrict judicial review in such situations was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration, when a conference committee rejected a House amendment which would have permitted any interested person to obtain review immediately after a certification [8] because, as Senator Taft noted, "such provision would permit dilatory tactics in representation proceedings." [9]

In light of the clear import of this history, this Court has consistently refused to allow direct review of such orders in the Courts of Appeals. *American Federation of Labor* v. *Labor Board, supra.* In two cases, however, each characterized by extraordinary circumstances, our decisions have permitted district court review of orders

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[6] "Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." S. Rep. No. 573, 74th Cong., 1st Sess., 14.

[7] 79 Cong. Rec. 7658.

[8] See H. R. Rep. No. 245, 80th Cong., 1st Sess., 43; H. R. Rep. No. 510, 80th Cong., 1st Sess., 56–57.

[9] 93 Cong. Rec. 6444.

entered in certification proceedings. In *Leedom* v. *Kyne*, 358 U. S. 184, despite the injunction of § 9 (b)(1) of the Act that "the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit," the Board—without polling the professional employees—approved as appropriate a unit containing both types of employees. The Board conceded in the Court of Appeals that it "had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees." 358 U. S., at 187. We pointed out there that the District Court suit was "not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U. S., at 188. Upon these grounds we affirmed the District Court's judgment setting aside the Board's "attempted exercise of [a] power that had been specifically withheld." 358 U. S., at 189. And in *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, in which District Court jurisdiction was upheld in a situation involving the question of application of the laws of the United States to foreign-flag ships and their crews, the Court was careful to note that "the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power. No question of remotely comparable urgency was involved in *Kyne*, which was a purely domestic adversary situation. The exception recognized today is therefore not to be taken as an enlargement of the exception in *Kyne*." 372 U. S., at 17.

The respondent makes no claim that this case is akin to *Sociedad Nacional.* The argument is, rather, that the present case is one which falls within the narrow limits of *Kyne,* as the District Court and the Court of Appeals held. The respondent points out that Congress has specifically excluded an independent contractor from the definition of "employee" in § 2 (3) of the Act.[10] It is said that the Board's finding that Greyhound is an employer of employees who are hired, paid, transferred and promoted by an independent contractor is, therefore, plainly in excess of the statutory powers delegated to it by Congress. This argument, we think, misconceives both the import of the substantive federal law and the painstakingly delineated procedural boundaries of *Kyne.*

Whether Greyhound, as the Board held, possessed sufficient control over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status. And whether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in *Kyne,* which depended solely upon construction of the statute. The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and

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[10] Section 2 (3) of the National Labor Relations Act, as amended, 29 U. S. C. § 152 (3). The effect of this provision was to overrule *Labor Board* v. *Hearst Publications,* 322 U. S. 111. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 18.

then only under the conditions explicitly laid down in § 9 (d) of the Act.

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

STONER *v.* CALIFORNIA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 209. Argued February 25, 1964.—
Decided March 23, 1964.

Police developed a lead near the scene of a robbery which ultimately led them to a hotel where, without a warrant, they searched petitioner's room in his absence, having been given access thereto by a hotel clerk. There they found articles like those associated with the crime by an eyewitness. Petitioner was arrested two days later in another State and following a trial in which the articles were used as evidence was convicted. *Held:*

1. A search without a warrant can be justified as incident to arrest only if substantially contemporaneous and confined to the immediate vicinity of arrest. *Agnello* v. *United States*, 269 U. S. 20, followed. Pp. 484–487.

2. A hotel guest is entitled to the constitutional protection against unreasonable searches and seizures. The hotel clerk had no authority to permit the room search and the police had no basis to believe that petitioner had authorized the clerk to permit the search. Pp. 488–490.

205 Cal. App. 2d 108, 22 Cal. Rptr. 718, reversed.

William H. Dempsey, Jr., by appointment of the Court, 375 U. S. 805, argued the cause and filed briefs for petitioner.

Arlo E. Smith, Chief Assistant Attorney General of California, argued the cause for respondent. With him on the brief were *Stanley Mosk*, Attorney General of California, and *Albert W. Harris, Jr.* and *Michael J. Phelan*, Deputy Attorneys General.

A. L. Wirin, Fred Okrand and *Paul Cooksey* filed a brief for the American Civil Liberties Union of Southern California, as *amicus curiae*, urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted of armed robbery after a jury trial in the Superior Court of Los Angeles County, California. At the trial several articles which had been found by police officers in a search of the petitioner's hotel room during his absence were admitted into evidence over his objection. A District Court of Appeal of California affirmed the conviction,[1] and the Supreme Court of California denied further review.[2] We granted certiorari, limiting review "to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure." 374 U. S. 826. For the reasons which follow, we conclude that the petitioner's conviction must be set aside.

The essential facts are not in dispute. On the night of October 25, 1960, the Budget Town Food Market in Monrovia, California, was robbed by two men, one of whom was described by eyewitnesses as carrying a gun and wearing horn-rimmed glasses and a grey jacket. Soon after the robbery a checkbook belonging to the petitioner was found in an adjacent parking lot and turned over to the police. Two of the stubs in the checkbook indicated that checks had been drawn to the order of the Mayfair Hotel in Pomona, California. Pursuing this lead, the officers learned from the Police Department of Pomona that the petitioner had a previous criminal record, and they obtained from the Pomona police a photograph of the petitioner. They showed the photograph to the two eyewitnesses to the robbery, who both stated that the picture looked like the man who had carried the gun. On the basis of this information the officers went to the Mayfair Hotel in Pomona at about 10

[1] 205 Cal. App. 2d 108, 22 Cal. Rptr. 718.

[2] 205 Cal. App. 2d, at 116.

o'clock on the night of October 27. They had neither search nor arrest warrants. There then transpired the following events, as later recounted by one of the officers:

> "We approached the desk, the night clerk, and asked him if there was a party by the name of Joey L. Stoner living at the hotel. He checked his records and stated 'Yes, there is.' And we asked him what room he was in. He stated he was in Room 404 but he was out at this time.
>
> "We asked him how he knew that he was out. He stated that the hotel regulations required that the key to the room would be placed in the mail box each time they left the hotel. The key was in the mail box, that he therefore knew he was out of the room.
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> "We asked him if he would give us permission to enter the room, explaining our reasons for this.
>
> "Q. What reasons did you explain to the clerk?
>
> "A. We explained that we were there to make an arrest of a man who had possibly committed a robbery in the City of Monrovia, and that we were concerned about the fact that he had a weapon. He stated 'In this case, I will be more than happy to give you permission and I will take you directly to the room.'
>
> "Q. Is that what the clerk told you?
>
> "A. Yes, sir.
>
> "Q. What else happened?
>
> "A. We left one detective in the lobby, and Detective Oliver, Officer Collins, and myself, along with the night clerk, got on the elevator and proceeded to the fourth floor, and went to Room 404. The night clerk placed a key in the lock, unlocked the door, and says, 'Be my guest.' "

The officers entered and made a thorough search of the room and its contents. They found a pair of horn-

rimmed glasses and a grey jacket in the room, and a .45-caliber automatic pistol with a clip and several cartridges in the bottom of a bureau drawer. The petitioner was arrested two days later in Las Vegas, Nevada. He waived extradition and was returned to California for trial on the charge of armed robbery. The gun, the cartridges and clip, the horn-rimmed glasses, and the grey jacket were all used as evidence against him at his trial.

The search of the petitioner's room by the police officers was conducted without a warrant of any kind, and it therefore "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones* v. *United States*, 357 U. S. 493, 499; *United States* v. *Jeffers*, 342 U. S. 48, 51." *Rios* v. *United States*, 364 U. S. 253, 261. The District Court of Appeal thought the search was justified as an incident to a lawful arrest.[3] But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Agnello* v. *United States*, 269 U. S. 20.[4]

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[3] The court reasoned that the officers had probable cause to arrest the petitioner prior to their entry into the hotel room; that they were not obliged to accept as true the night clerk's statement that the petitioner was not in his room; that "it may be reasonably inferred that they entered his room for the purpose of making an arrest," that their observation of the glasses in plain sight reasonably led them to a further search; and that in the circumstances the arrest and the search and seizure were "part of the same transaction." 205 Cal. App. 2d 108, 113, 22 Cal. Rptr. 718, 722.

[4] "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape

Whatever room for leeway there may be in these concepts,[5] it is clear that the search of the petitioner's hotel room in Pomona, California, on October 27 was not incident to his arrest in Las Vegas, Nevada, on October 29. The search was completely unrelated to the arrest, both as to time and as to place. See *Preston* v. *United States*, decided this day, *ante*, p. 364.

In this Court the respondent has recognized that the reasoning of the California District Court of Appeal cannot be reconciled with our decision in *Agnello*, nor, indeed, with the most recent California decisions.[6] Accordingly, the respondent has made no argument that the search can be justified as an incident to the petitioner's arrest. Instead, the argument is made that the search of the hotel room, although conducted without the petitioner's consent, was lawful because it was con-

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from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. . . . But the right does not extend to other places." *Id.*, at 30. See also *Ker* v. *California*, 374 U. S. 23, 42, n. 13; *Lustig* v. *United States*, 338 U. S. 74, 79–80.

[5] Although some members of this Court have expressed the view that the statement in *Agnello* defining the permissible bounds of a search incident to arrest went too far, see, *e. g.*, *Harris* v. *United States*, 331 U. S. 145, 155, 183, 195 (dissenting opinions); *United States* v. *Rabinowitz*, 339 U. S. 56, 68 (dissenting opinion), the *Agnello* holding as to what may *not* be searched—a house substantially removed geographically from the place of arrest at a time not substantially contemporaneous with the arrest—has never been questioned in this Court.

[6] "[T]he search cannot be justified as incident to the arrest 'for it was at a distance from the place thereof and was not contemporaneous therewith.' (Castaneda v. Superior Court, 59 A. C. 456, 459, 30 Cal. Rptr. 1, 3, 380 P. 2d 641, 643; Tompkins v. Superior Court, 59 A. C. 75, 77, 27 Cal. Rptr. 889, 378 P. 2d 113; People v. Gorg, 45 Cal. 2d 776, 781, 291 P. 2d 469.)" *People* v. *King*, 60 Cal. 2d 308, 311, 32 Cal. Rptr. 825, 826, 384 P. 2d 153, 155.

ducted with the consent of the hotel clerk. We find this argument unpersuasive.

Even if it be assumed that a state law which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests could survive constitutional challenge, there is no intimation in the California cases cited by the respondent that California has any such law.[7] Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." As this Court has said,

> "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States*, 362 U. S. 257, 266–267.

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[7] See *Roberts* v. *Casey*, 36 Cal. App. 2d Supp. 767, 93 P. 2d 654; *Fox* v. *Windemere Hotel Apt. Co.*, 30 Cal. App. 162, 157 P. 820; *People* v. *Vaughan*, 65 Cal. App. 2d Supp. 844, 150 P. 2d 964. "The mere fact that a person is a hotel manager does not import an authority to permit the police to enter and search the rooms of her guests." *People* v. *Burke*, 208 Cal. App. 2d 149, 160, 24 Cal. Rptr. 912, 919.

It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

At least twice this Court has explicitly refused to permit an otherwise unlawful police search of a hotel room to rest upon consent of the hotel proprietor. *Lustig* v. *United States,* 338 U. S. 74; *United States* v. *Jeffers,* 342 U. S. 48. In *Lustig* the manager of a hotel allowed police to enter and search a room without a warrant in the occupant's absence, and the search was held unconstitutional. In *Jeffers* the assistant manager allowed a similar search, and that search was likewise held unconstitutional.

It is true, as was said in *Jeffers,* that when a person engages a hotel room he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties." 342 U. S., at 51. But the conduct of the night clerk and the police in the present case was of an entirely different order. In a closely analogous situation the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purposes, such as to "view waste." *Chapman* v. *United States,* 365 U. S. 610. The Court pointed out that the officers' purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave

tenants' homes secure only in the discretion of their landlords.

No less than a tenant of a house, or the occupant of a room in a boarding house, *McDonald* v. *United States*, 335 U. S. 451, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. *Johnson* v. *United States*, 333 U. S. 10. That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel. It follows that this search without a warrant was unlawful. Since evidence obtained through the search was admitted at the trial, the judgment must be reversed. *Mapp* v. *Ohio*, 367 U. S. 643.[8]

It is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I entirely agree with the Court's opinion, except as to its disposition of the case. I would remand the case to the California District Court of Appeal so that it may consider whether or not admission of the illegally seized evidence was harmless error. *Fahy* v. *Connecticut*, 375 U. S. 85, does not require or justify the course which the Court takes. In *Fahy*, Connecticut at least had had the opportunity to decide the question of harmless error with respect to the illegally seized evidence there involved;

[8] The respondent has argued that the case should be remanded to let the California District Court of Appeal decide whether the admission of this evidence was harmless error. But the conviction depended in large part upon the jury's resolution of the question of the credibility of witnesses, and that determination must almost certainly have been influenced by the incriminating nature of the physical evidence illegally seized and erroneously admitted. There is thus at least "a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U. S. 85, 86.

here California has had no such opportunity.* For this Court to decide that question as an original matter is, in my opinion, incompatible with proper federal-state relations.

Accordingly, I would vacate the judgment below and remand the case to the California courts for further appropriate proceedings.

*The evidence against the accused included a confession of the crime charged. This Court refused to review the claim, contained in the petition for certiorari, that this confession had been involuntarily made. 374 U. S. 826, *ante*, p. 484.

UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 89. Argued February 19, 1964.—Decided March 23, 1964.

Petitioner union called a strike and picketed all entrances to the respondent company's plant, including an entrance to a railroad-owned spur track immediately adjacent to the struck premises, to induce railroad employees not to make pickups and deliveries at the struck plant. The picketing was accompanied by force and violence. The National Labor Relations Board found that the union had committed an unfair labor practice under § 8 (b) (1) (A) of the National Labor Relations Act, but held the picketing to be primary activity not barred by § 8 (b) (4) (B) in view of that section's proviso that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The Court of Appeals reversed. *Held:*

1. Primary picketing under § 8 (b) (4) includes the right, during a strike, to picket an entrance reserved for employees of neutral delivery men furnishing routine service essential to the employer plant's normal operations. *Electrical Workers Local No. 761* v. *Labor Board*, 366 U. S. 667, followed. Picketing at the railroad gate, which was the rail entrance gate to the plant, is just as permissible as at a gate owned by the plant. Pp. 493–500.

2. Picketing does not become illegal secondary activity solely because it is accompanied by threats and violence. Pp. 501–502.

311 F. 2d 135, reversed.

Jerry D. Anker argued the cause for petitioners. With him on the brief were *David E. Feller, Elliot Bredhoff* and *Michael H. Gottesman.*

Dominick L. Manoli argued the cause for the National Labor Relations Board. With him on the brief were *Solicitor General Cox, Arnold Ordman* and *Norton J. Come.*

Theophil C. Kammholz argued the cause for respondent Carrier Corporation. With him on the brief was *Kenneth C. McGuiness.*

Gregory S. Prince filed a brief for the Association of American Railroads, as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question presented by this case is whether a union violates § 8 (b)(4) of the National Labor Relations Act,[1] 49 Stat. 449, as amended, by picketing an entrance, used exclusively by railroad personnel, to a railroad spur track located on a right-of-way owned by the railroad and adjacent to the struck employer's premises.

On March 2, 1960, after the petitioning union and the respondent company, Carrier Corporation, failed to agree

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[1] Section 8 (b)(4) provides in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U. S. C. (Supp. IV) § 158 (b)(4).

upon a collective bargaining contract the union, which was the certified bargaining agent, called a strike in support of its demands. During the course of the strike the union picketed the several entrances to the plant. Along the south boundary of Carrier's property was a 35-foot railroad right-of-way used by the railroad for deliveries to Carrier and to three other companies in the area, General Electric, Western Electric, and Brace-Mueller-Huntley. The railroad spur ran across Thompson Road, a public thoroughfare which bounded Carrier's property on the west, and through a gate in a continuous chain-link fence which enclosed both the property of Carrier Corporation and the railroad right-of-way. The gate was locked when the spur was not in use and was accessible only to railroad employees. The picketing with which we are concerned occurred at this gate.

Between March 2 and March 10, railroad personnel made several trips through the gate for the purpose of switching out cars for General Electric, Western Electric and Brace-Mueller-Huntley, and also to supply coal to Carrier and General Electric.[2] On March 11 a switch engine manned by a regular switching crew made one trip serving the three nonstruck corporations. It then returned, this time manned by supervisory personnel, with 14 empty boxcars. The pickets, being aware that these cars were destined for use by Carrier, milled around the engine from the time it reached the western side of Thompson Road, attempting to impede its progress. By inching its way across the road, however, the locomotive succeeded in reaching and entering the gate. After uncoupling the empties just inside the railroad right-of-way, for future use by Carrier, the engine picked up 16 more

[2] The union made no objection to the deliveries of coal to Carrier, since the nonstruck General Electric plant obtained its coal from Carrier.

cars which Carrier wanted shipped out and made its way back toward the gate. This time resistance from the picketing strikers was more intense. Some of the men stood on the footboard of the engine, others prostrated themselves across the rails and one union official parked his car on the track. Invective and threats were directed toward the operators of the train, and only after the pickets were dispersed by deputies of the Onondaga County sheriff's office was it able to pass.

Acting upon charges filed by Carrier, the Regional Director of the National Labor Relations Board issued a complaint against the international and local union organizations and individual officials of each, alleging violations of §§ 8 (b)(1)(A) and 8 (b)(4)(i) and (ii)(B) of the National Labor Relations Act. The Trial Examiner found the union in violation of both sections and recommended appropriate cease-and-desist orders. The National Labor Relations Board sustained the Examiner's finding that an unfair labor practice had been committed under § 8 (b)(1)(A) and entered an order accordingly. The union does not contest this determination by the Board. The Board further concluded, however, that the picketing was primary activity and therefore saved from § 8 (b)(4)(B)'s proscription by the proviso that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Noting the conceded fact that the deliveries and removals by the railroad in this case were made in connection with the normal operations of the struck employer, the Board regarded as dispositive this Court's decision in *Electrical Workers Local No. 761* v. *Labor Board*, 366 U. S. 667, the *General Electric* case. 132 N. L. R. B. 127.

The Court of Appeals for the Second Circuit reversed the Board's decision on the ground that the picketing at the railroad gate was directed solely at the neutral rail-

road employees and could not be regarded as incident to what the court considered the only legitimate union objective: publicizing the labor dispute to the employees involved therein, those working for Carrier. This Court's holding in *General Electric* was deemed inapposite since the gate in the present case is located on premises belonging to the neutral employer. 311 F. 2d 135. Chief Judge Lumbard dissented. Because of the asserted conflict with *General Electric* and the importance of the problem to the national labor policy we granted certiorari. 373 U. S. 908. We reverse the decision of the Court of Appeals.

The activities of the union in this case clearly fall within clauses (i) and (ii) of § 8 (b)(4); likewise the objective, to induce the railroad to cease providing freight service to Carrier for the duration of the strike, is covered by the language of subsection (B), exclusive of the proviso. The question we have is whether the activities of the union, although literally within the definition of secondary activities contained in clauses (i) and (ii) of § 8 (b)(4), are nevertheless within the protected area of primary picketing carved out by Congress in the proviso to subsection (B).

The dividing line between forbidden secondary activity and protected primary activity has been the subject of intense litigation both before and after the 1959 amendments to § 8 (b)(4), which broadened the coverage of the section but also added the express exceptions for the primary strike and primary picketing. We need not detail the course of this sometimes confusing litigation; for in the *General Electric* case, *supra,* the Court undertook to survey the cases dealing with picketing at both primary and secondary sites and the result reached in that case largely governs this one. In the *General Electric* case, because the union's object was to enmesh "employees of the neutral employers in its dispute" with the primary

employer, the Board ordered the union to cease picketing a separate gate used exclusively by employees of certain independent contractors who had been doing work on the primary premises on a regular and continuous basis for a considerable period of time. 123 N. L. R. B. 1547. In this Court, the Board conceded that when the struck premises are occupied by the primary employer alone, the right of the union to engage in primary activity at or in connection with the primary premises may be given unlimited effect—"all union attempts, by picketing and allied means, to cut off deliveries, pickups, and employment at the primary employer's plant will be regarded as primary and outside the purview of Section 8 (b)(4)(A)." [3] But the Board insisted that the facts presented a common situs problem since the regular work of the contractors was continuously done on the primary premises and hence the rules of the *Moore Dry Dock* case [4] should be applied. The union, on the other hand, argued that no picketing at the primary premises should be considered as secondary activity.

The Court accepted the approach neither of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the primary employer's plant. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if

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[3] Brief for the National Labor Relations Board, *Electrical Workers Local 761* v. *Labor Board*, No. 321, October Term, 1960, p. 31.

[4] *Sailors' Union of the Pacific*, 92 N. L. R. B. 547.

their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice. The order of the NLRB was vacated to permit determination of the case in accordance with the proper test.

It seems clear that the rejection of the Board's position in *General Electric* leaves no room for the even narrower approach of the Court of Appeals in this case, which is that the picketing at the site of a strike could be directed at secondary employees only where incidental to appeals to primary employees. Under this test, no picketing at gates used only by employees of delivery men would be permitted, a result expressly disapproved by the Court in *General Electric:* "On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U. S., at 680–681.

Although the picketing in the *General Electric* case occurred prior to the 1959 amendments to § 8 (b)(4), the decision was rendered in 1961 and the Court bottomed its decision upon the amended law and its legislative history.[5] We think *General Electric's* construction of the

[5] The Court said: "The 1959 Amendments to the National Labor Relations Act, which removed the word 'concerted' from the boycott provisions, included a proviso that 'nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' 29 U. S. C. (Supp. I, 1959) § 158 (b)(4)(B). The proviso was directed against the fear that the removal of 'concerted' from the statute might be interpreted so that 'the picketing at the factory violates section 8 (b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike.' Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589." 366 U. S., at 681.

proviso to § 8 (b)(4)(B) is sound and we will not disturb it. The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved "primary picketing" from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the plant's regular operations.[6]

Nor may the *General Electric* case be put aside for the reason that the picketed gate in the present case was located on property owned by New York Central Railroad and not upon property owned by the primary employer. The location of the picketing is an important but not decisive factor, and in this case we agree with Judge Lumbard that the location of the picketed gate upon New York Central property has little, if any, significance:

> "In this case, it is undisputed that the railroad's operations for Carrier were in furtherance of Carrier's normal business. It is equally clear from the record that the picketing employees made no attempt to interfere with any of the railroad's operations for plants other than Carrier. The railroad employees were not encouraged to, nor did they, refuse to serve the other plants. The picketing was designed to

[6] See H. R. Rep. No. 741, on H. R. 8342, 86th Cong., 1st Sess., 21, 80; H. R. Rep. No. 1147, on S. 1555, 86th Cong., 1st Sess., 38; 2 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 1575–1576, 1707, 1857.

> accomplish no more than picketing outside one of Carrier's own delivery entrances might have accomplished. Because the fence surrounding the railroad's right of way was a continuation of the fence surrounding the Carrier plant, there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier." 311 F. 2d 135, 154.

The railroad gate adjoined company property and was in fact the railroad entrance gate to the Carrier plant. For the purposes of § 8 (b)(4) picketing at a situs so proximate and related to the employer's day-to-day operations is no more illegal than if it had occurred at a gate owned by Carrier.

Carrier, however, has another argument: holding this picketing protected thwarts the purpose of the 1959 amendment to bring railroads within the protection of § 8 (b)(4). The definitions of "employer" and "employee" in §§ 2 (2) and 2 (3) of the Act specifically exclude "any person subject to the Railway Labor Act" and the employees of any such "person." Prior to 1959, § 8 (b)(4) prohibited secondary inducements to "the employees" of any "employer" and there arose a conflict of authority between the Board and several Courts of Appeals as to whether or not the secondary boycott provisions applied to any appeals to railroad employees.[7]

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[7] Compare *International Brotherhood of Teamsters* (The International Rice Milling Co.), 84 N. L. R. B. 360; *International Woodworkers of America* (Smith Lumber Co.), 116 N. L. R. B. 1756; *International Brotherhood of Teamsters* (The Alling & Cory Company), 121 N. L. R. B. 315; and *Lumber & Sawmill Workers Local Union 2409* (Great Northern Railway Co.), 122 N. L. R. B. 1403, with *International Rice Milling Co.* v. *Labor Board*, 183 F. 2d 21 (C. A. 5th Cir.); *Smith Lumber Co.* v. *Labor Board*, 246 F. 2d 129 (C. A. 5th Cir.); *Great Northern Railway Co.* v. *Labor Board*, 272 F. 2d 741 (C. A. 9th Cir.).

Congress resolved this question in 1959 by revising § 8 (b)(4) to proscribe inducement of secondary work stoppages by "any individual employed by any person." There is no indication whatever that Congress intended by the revision to do more than to eliminate the uncertainty deriving from the words "employer" and "employee" and thereby to extend to railroads the same protections which other employers enjoyed. Our holding does not derogate from this equality of treatment. On the contrary, the rule for which Carrier contends would place the railroad on a better footing than all other employers who do business with the struck plant. It would distinguish between picketing an entrance to a struck plant which is owned by the primary employer and picketing a gate which by design or otherwise had been conveyed to a neutral furnishing delivery service, an anomaly which we do not believe Congress intended.

Finally, we reject Carrier's argument that whatever the rule may be in the ordinary case of separate gate picketing, the picketing of the railroad gate in this case was violative of § 8 (b)(4) because it was accompanied by threats and violence. Under § 8 (b)(4) the distinction between primary and secondary picketing carried on at a separate gate maintained on the premises of the primary employer, does not rest upon the peaceful or violent nature of the conduct, but upon the type of work being done by the picketed secondary employees. Such picketing does not become illegal secondary activity when violence is involved but only when it interferes with business intercourse not connected with the ordinary operations of the employer.[8] This is not to say, of course, that violent

[8] Compare *Labor Board* v. *Rice Milling Co.*, 341 U. S. 665, 672, in which the Court said: "In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it, the complaint more properly would

primary picketing is in all respects legal but only that it is not forbidden by § 8 (b)(4); it would escape neither the provisions of the federal law nor the local law if violative thereof.

This is all, we think, that was intended by the proviso to § 8 (b)(4) which provides that nothing in subsection (B) "shall be construed to make unlawful, *where not otherwise unlawful,* any primary strike or primary picketing." (Emphasis supplied.) It is possible to read this language to mean that the proviso does not save from proscription under § 8 (b)(4) union activity violative of other laws, but this interpretation would condemn as secondary conduct any and all picketing directed toward neutral employers so long as the conduct, as in the case of violence, was forbidden by some other law. In our view, the words "where not otherwise unlawful" were inserted only to make clear that the proviso, while excluding the conduct from the § 8 (b)(4) sanctions did not also legalize it under other laws, state or federal. The legality of violent picketing, if "primary," must be determined under other sections of the statute or under state law.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

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have relied upon § 8 (b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8 (b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."

JACKSON ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 361. Argued March 4, 1964.—Decided March 23, 1964.

Fourteen months after her husband's death, a state court awarded his widow a support and maintenance allowance payable monthly for not to exceed twenty-four months from date of decedent's death. The widow survived the period, unremarried, and under state law was entitled to and did receive the payments. Deduction of all the payments on the federal estate tax return, as part of the marital deduction provided by § 812 (e) of the Internal Revenue Code of 1939, was disallowed by the Commissioner of Internal Revenue. The District Court held that the widow's allowance was a "terminable interest" under § 812 (e)(1)(B) and thus not deductible, and the Court of Appeals affirmed. *Held:*

1. Since a widow's right to the allowance under the State law is defeated by her death or remarriage, her interest is terminable under § 812 (e)(1)(B). Pp. 503–506.

2. Qualification for the marital deduction, including the widow's allowance, is determined as of time of death. *Cunha's Estate* v. *Commissioner*, 279 F. 2d 292; *United States* v. *Quivey*, 292 F. 2d 252, followed. Pp. 507–511.

317 F. 2d 821, affirmed.

Paul Burks argued the cause for petitioners. With him on the briefs were *Edward L. Compton* and *John C. Argue*.

John B. Jones, Jr. argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Michael I. Smith*.

MR. JUSTICE WHITE delivered the opinion of the Court.

Since 1948 § 812 (e)(1)(A) of the Internal Revenue Code of 1939 has allowed a "marital deduction" from a decedent's gross taxable estate for the value of interests

in property passing from the decedent to his surviving spouse.[1] Subsection (B) adds the qualification, however, that interests defined therein as "terminable" shall not qualify as an interest in property to which the marital deduction applies.[2] The question raised by this case is whether the allowance provided by California law for the support of a widow during the settlement of her husband's estate is a terminable interest.

Petitioners are the widow-executrix and testamentary trustee under the will of George Richards who died a resident of California on May 27, 1951. Acting under the Probate Code of California, the state court, on June 30, 1952, allowed Mrs. Richards the sum of $3,000 per month from the corpus of the estate for her support and maintenance, beginning as of May 27, 1951, and continuing for a period of 24 months from that date. Under the terms of the order, an allowance of $42,000 had

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[1] The deduction allowed is: "An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 26 U. S. C. (1952 ed.) § 812 (e)(1)(A).

[2] Subsection (B) provides in pertinent part: "Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse." 26 U. S. C. (1952 ed.) § 812 (e)(1)(B).

The marital-deduction and terminable-interest provisions of the 1954 Code are similar to those of its 1939 counterpart. See 26 U. S. C. (1958 ed.) § 2056 (a) and (b).

accrued during the 14 months since her husband's death. This amount, plus an additional $3,000 per month for the remainder of the two-year period, making a total of $72,000, was in fact paid to Mrs. Richards as widow's allowance.

On the federal estate tax return filed on behalf of the estate, the full $72,000 was claimed as a marital deduction under § 812 (e) of the Internal Revenue Code of 1939. The deduction was disallowed, as was a claim for refund after payment of the deficiency, and the present suit for refund was then brought in the District Court. The District Court granted summary judgment for the United States, holding, on the authority of *Cunha's Estate* v. *Commissioner,* 279 F. 2d 292, that the allowance to the widow was a terminable interest and not deductible under the marital provision of the Internal Revenue Code. The Court of Appeals affirmed, 317 F. 2d 821, and we brought the case here because of an asserted conflict between the decision below and that of the Court of Appeals for the Fifth Circuit in *United States* v. *First National Bank & Trust Co. of Augusta,* 297 F. 2d 312. 375 U. S. 894. For the reasons given below, we affirm the decision of the Court of Appeals.

In enacting the Revenue Act of 1948, 62 Stat. 110, with its provision for the marital deduction, Congress left undisturbed § 812 (b) (5) of the 1939 Code, which allowed an estate tax deduction, as an expense of administration, for amounts "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent." 26 U. S. C. (1946 ed.) § 812 (b)(5). As the legislative history shows, support payments under § 812 (b)(5) were not to be treated as part of the marital deduction allowed by § 812 (e)(1).[3] The Revenue Act of 1950, 64 Stat. 906, however, re-

[3] S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 3.

pealed § 812 (b)(5) because, among other reasons, Congress believed the section resulted in discriminations in favor of States having liberal family allowances.[4] Thereafter allowances paid for the support of a widow during the settlement of an estate "heretofore deductible under section 812 (b) will be allowable as a marital deduction subject to the conditions and limitations of section 812 (e)." S. Rep. No. 2375, 81st Cong., 2d Sess., p. 130.

The "conditions and limitations" of the marital deduction under § 812 (e) are several but we need concern ourselves with only one aspect of § 812 (e)(1)(B), which disallows the deduction of "terminable" interests passing to the surviving spouse. It was conceded in the Court of Appeals that the right to the widow's allowance here involved is an interest in property passing from the decedent within the meaning of § 812 (e)(3), that it is an interest to which the terminable-interest rule of § 812 (e)(1)(B) is applicable, and that the conditions set forth in (i) and (ii) of § 812 (e)(1)(B) were satisfied under the decedent's will and codicils thereto. The issue, therefore, is whether the interest in property passing to Mrs. Richards as widow's allowance would "terminate or fail" upon the "lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur."

We accept the Court of Appeals' description of the nature and characteristics of the widow's allowance under California law. In that State, the right to a widow's allowance is not a vested right and nothing accrues before the order granting it. The right to an allowance is lost when the one for whom it is asked has lost the status upon

[4] The legislative history states: "In practice [the support allowance deduction] has discriminated in favor of estates located in States which authorize liberal allowances for the support of dependents, and it has probably also tended to delay the settlement of estates." S. Rep. No. 2375, 81st Cong., 2d Sess., p. 57.

which the right depends. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. The amount of the widow's allowance which has accrued and is unpaid at the date of death of the widow is payable to her estate but the right to future payments abates upon her death. The remarriage of a widow subsequent to an order for an allowance likewise abates her right to future payments. 317 F. 2d 821, 825.

In light of these characteristics of the California widow's allowance, Mrs. Richards did not have an indefeasible interest in property at the moment of her husband's death since either her death or remarriage would defeat it. If the order for support allowance had been entered on the day of her husband's death, her death or remarriage at any time within two years thereafter would terminate that portion of the interest allocable to the remainder of the two-year period. As of the date of Mr. Richards' death, therefore, the allowance was subject to failure or termination "upon the occurrence of an event or contingency." That the support order was entered in this case 14 months later does not, in our opinion, change the defeasible nature of the interest.

Petitioners ask us to judge the terminability of the widow's interest in property represented by her allowance as of the date of the Probate Court's order rather than as of the date of her husband's death. The court's order, they argue, unconditionally entitled the widow to $42,000 in accrued allowance of which she could not be deprived by either her death or remarriage. It is true that some courts have followed this path,[5] but it is difficult to accept an approach which would allow a deduc-

[5] *United States* v. *First National Bank & Trust Co. of Augusta*, 297 F. 2d 312 (C. A. 5th Cir.); *Estate of Gale* v. *Commissioner*, 35 T. C. 215; *Estate of Rudnick* v. *Commissioner*, 36 T. C. 1021.

tion of $42,000 on the facts of this case, a deduction of $72,000 if the order had been entered at the end of two years from Mr. Richards' death and none at all if the order had been entered immediately upon his death. Moreover, judging deductibility as of the date of the Probate Court's order ignores the Senate Committee's admonition that in considering terminability of an interest for purposes of a marital deduction "the situation is viewed as at the date of the decedent's death." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10. We prefer the course followed by both the Court of Appeals for the Ninth Circuit in *Cunha's Estate, supra,* and by the Court of Appeals for the Eighth Circuit in *United States* v. *Quivey,* 292 F. 2d 252. Both courts have held the date of death of the testator to be the correct point of time from which to judge the nature of a widow's allowance for the purpose of deciding terminability and deductibility under § 812 (e)(1). This is in accord with the rule uniformly followed with regard to interests other than the widow's allowance, that qualification for the marital deduction must be determined as of the time of death.[6]

Our conclusion is confirmed by § 812 (e)(1)(D),[7] which saves from the operation of the terminable-interest

[6] *Bookwalter* v. *Lamar,* 323 F. 2d 664 (C. A. 8th Cir.); *United States* v. *Mappes,* 318 F. 2d 508 (C. A. 10th Cir.); *Commissioner* v. *Ellis' Estate,* 252 F. 2d 109 (C. A. 3d Cir.); *Starrett* v. *Commissioner,* 223 F. 2d 163 (C. A. 1st Cir.); *Estate of Sbicca* v. *Commissioner,* 35 T. C. 96.

[7] "For the purposes of subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

"(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

"(ii) such termination or failure does not in fact occur." 26 U. S. C. (1952 ed.) § 812 (e)(1)(D).

rule interests which by their terms may (but do not in fact) terminate only upon failure of the widow to survive her husband for a period not in excess of six months. The premise of this provision is that an interest passing to a widow is normally to be judged as of the time of the testator's death rather than at a later time when the condition imposed may be satisfied; hence the necessity to provide an exception to the rule in the case of a six months' survivorship contingency in a will.[8] A gift conditioned upon eight months' survivorship, rather than six, is a nondeductible terminable interest for reasons which also disqualify the statutory widow's allowance in California where the widow must survive and remain unmarried at least to the date of an allowance order to become indefeasibly entitled to any widow's allowance at all.

Petitioners contend, however, that the sole purpose of the terminable-interest provisions of the Code is to assure that interests deducted from the estate of the deceased spouse will not also escape taxation in the estate of the survivor. This argument leads to the conclusion that since it is now clear that unless consumed or given away during Mrs. Richards' life, the entire $72,000 will be taxed to her estate, it should not be included in her husband's. But as we have already seen, there is no provision in the Code for deducting all terminable interests which become nonterminable at a later date and therefore taxable in the estate of the surviving spouse if not consumed or trans-

[8] The Senate Report accompanying the House bill which eventually became law states that "Subparagraph (D) of section 812 (e)(1) provides an exception to the terminable interest rule under subparagraph (B) of such section. This exception is for the purpose of allowing the marital deduction in certain cases where there is a contingency with respect to the interest passing to the surviving spouse under a common-disaster clause or similar clause in the decedent's will." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 15.

ferred. The examples cited in the legislative history make it clear that the determinative factor is not taxability to the surviving spouse but terminability as defined by the statute.[9] Under the view advanced by petitioners all cash allowances actually paid would fall outside § 812 (e)(1)(B); on two different occasions the Senate has refused to give its approval to House-passed amendments to the 1954 Code which would have made the terminable-interest rule inapplicable to all widow's allowances actually paid within specified periods of time.[10]

We are mindful that the general goal of the marital deduction provisions was to achieve uniformity of federal estate tax impact between those States with community property laws and those without them.[11] But the device of the marital deduction which Congress chose to achieve uniformity was knowingly hedged with limitations, including the terminable-interest rule. These provisions may be imperfect devices to achieve the desired end,[12] but they are the means which Congress chose. To the extent it was thought desirable to modify the rigors of the terminable-interest rule, exceptions to the rule were written into the Code. Courts should hesitate to provide still another exception by straying so far from the statutory language as to allow a marital deduction for the widow's allowance provided by the California statute.

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[9] *Id.*, at 10, 11, 15.

[10] See S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125; H. R. 2573, 86th Cong., 1st Sess.; and H. R. Rep. No. 818, 86th Cong., 1st Sess.

[11] *United States* v. *Stapf*, 375 U. S. 118.

[12] See Surrey, Federal Taxation of the Family—The Revenue Act of 1948, 61 Harv. L. Rev. 1097, 1156–1157; Anderson, The Marital Deduction and Equalization Under the Federal Estate and Gift Taxes Between Common Law and Community Property States, 54 Mich. L. Rev. 1087, 1109.

The achievement of the purposes of the marital deduction is dependent to a great degree upon the careful drafting of wills; we have no fear that our decision today will prevent either the full utilization of the marital deduction or the proper support of widows during the pendency of an estate proceeding.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

KIRK *v.* BOEHM, SUPERINTENDENT, DEPARTMENT OF PUBLIC INSTRUCTION, PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 753. Decided March 23, 1964.

216 F. Supp. 952, affirmed.

Appellant *pro se*.

John D. Killian III, Deputy Attorney General of Pennsylvania, and *Lewis B. Beatty, Jr.* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

CEPERO *v.* PRESIDENT OF THE UNITED STATES ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 671, Misc., and 843, Misc. Decided March 23, 1964.

Appeals dismissed for want of jurisdiction.

PER CURIAM.

The appeals are dismissed for want of jurisdiction.

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

FAWCETT PUBLICATIONS, INC., *v.* MORRIS.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 57. Decided March 23, 1964.

Appeal dismissed and certiorari denied.
Reported below: 377 P. 2d 42.

Howard Ellis, Perry S. Patterson, Don H. Reuben and *Thomas A. Diskin* for appellant.

C. E. Ram Morrison for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted or that the petition for writ of certiorari should be granted.

AUCLAIR TRANSPORTATION, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 724. Decided March 23, 1964.

221 F. Supp. 328, affirmed.

Peter T. Beardsley and *Richard R. Sigmon* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission; and *William J. Taylor* for Railway Express Agency, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

FEDERAL POWER COMMISSION *v.* HUNT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 273. Argued March 2, 1964.—Decided March 30, 1964.

1. The issuance by the Federal Power Commission (FPC) of a temporary certificate of public convenience and necessity under § 7 (c) of the Natural Gas Act, authorizing the sale of natural gas in interstate movement pending determination of an application for permanent certification, may be conditioned in the FPC's discretion upon the maintenance of a prescribed price during the period of the temporary authorization. Pp. 515–521.
2. The procedure of § 4 of the Act for the filing of proposed changes in rates is available to the producer only after the issuance of a permanent or an unconditional temporary certificate. Pp. 523–527.

306 F. 2d 334, reversed.

Richard A. Solomon argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Ralph S. Spritzer, Howard E. Wahrenbrock* and *Peter H. Schiff.*

Richard F. Generelly argued the cause for respondents. With him on the brief were *Robert W. Henderson, Thomas G. Crouch* and *Robert E. May.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue in this case is whether the Federal Power Commission, when granting an application for a temporary certificate authorizing the sale of natural gas in interstate commerce, can impose a condition that the applicant shall not increase its certificated price pending a hearing on the applicant's petition for permanent authority. Each of the seven applications involved here requested temporary operating authority to sell natural gas in interstate commerce on emergency grounds, as provided by §§ 7 (c) and (e) of the Natural

Gas Act.[1] In each case the Federal Power Commission conditioned the temporary grant of authority upon, *inter alia*, the producer's maintaining the initial price, without

[1] Section 7 (c), 52 Stat. 824, as amended, 56 Stat. 83, 15 U. S. C. § 717f (c), provides:

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on . . . [February 7, 1942], over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after . . . [February 7, 1942]. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest."

Section 7 (e), 52 Stat. 824, as amended, 56 Stat. 84, 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any

increase, during the period of the temporary authorization. On appeal, the Court of Appeals set aside this condition, holding that it was beyond the power of the Commission and conflicted with the right of a producer to initiate a higher contract rate under § 4 of the Act. 306 F. 2d 334. We granted certiorari because of the importance of the question to the enforcement of the Natural Gas Act. 375 U. S. 810. We conclude that the Commission can impose such a condition in granting temporary authorizations under § 7 and therefore reverse the judgments.

I.

While this case involves applications for seven different temporary authorizations, the essential facts as to each, save the dates and gas fields, are the same. Since the parties and the Court of Appeals have treated the sale by the Hassie Hunt Trust as typical, we shall do likewise.

The Hunts are producers of natural gas in the Alta Loma area in Galveston County in Texas Railroad District No. 3. In July 1960, the Commission issued a permanent certificate authorizing sales of natural gas from the Alta Loma and other areas to the Peoples Gulf Coast Natural Gas Pipeline Co. 24 F. P. C. 1. The authorization was conditioned upon the producer's filing

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qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

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an amended contract providing for an initial price of 20¢ per Mcf., with an escalation of 3¢ after 10 years. The original contract had allowed four 2¢ escalations at four-year intervals. The order was found defective, however, because the Public Service Commission of New York, which sought a lower initial price, had been refused intervention before the Commission. See *Public Service Comm'n* v. *Federal Power Comm'n,* 111 U. S. App. D. C. 153, 295 F. 2d 140, cert. denied, *sub nom. Shell Oil Co.* v. *Public Service Comm'n,* 368 U. S. 948. Thereafter the Commission vacated its issuance of the certificate and ordered a new hearing on the question of initial price. 26 F. P. C. 689.

In the meantime, after the issuance, but prior to the vacating, of the July 1960 certificate, the Commission issued General Policy No. 61–1, 18 CFR § 2.56, 24 F. P. C. 818, which fixed the guideline for initial prices for Texas Railroad District No. 3 at 18¢ per Mcf., 2¢ below the initial price allowed in the July 1960 certificate.

Thereafter, on February 27, 1961, the Hassie Hunt Trust applied for a permanent certificate of public convenience and necessity allowing sales from a new well in this same area to Natural Gas Pipeline Company of America, the successor to Peoples Gulf Coast. It also applied for temporary authorization to begin service immediately under the emergency provisions of the Commission's Regulations issued under § 7 (c) of the Act. 18 CFR § 157.28. The emergency was alleged to result from the "necessity of paying shut-in royalties and the incurrence of drainage through sales by others to pipeline companies other than Natural." The new sale was covered by a 20-year contract, dated December 15, 1960, with provisions identical to those of the earlier contract, *i. e.,* an initial price of 20¢ per Mcf. with 2¢ escalations at four-year intervals. The Commission on April 7, 1961, granted the temporary authorization subject to

three conditions: (1) that the total initial price not exceed 18¢ per Mcf. and thus be in keeping with the guideline rate set for Texas Railroad District No. 3, (2) that within 20 days supplements to the contracts be filed consistent with this price, and (3) that the temporary authorization be accepted in writing within 20 days. Deliveries were commenced by the producer on April 19 before these conditions were met. On May 5 a conditional acceptance was filed reserving the right to seek removal of the conditions imposed and tendering an amended contract providing for an 18¢ initial price for 30 days with 20¢ per Mcf. thereafter. The Commission rejected this conditional acceptance and subsequently, in order to make clear its position, specifically provided that the initial rate was to be 18¢ and that there was to be no change therein pending the hearing on permanent authorization. The proposed 20¢ rate was rejected and thereafter this review followed.

The Court of Appeals sustained the 18¢ initial price but held that the Commission had no power to condition temporary authorizations so as to preclude the filing and collection of increased rates pursuant to § 4 of the Act.

II.

Once again we are confronted with a question solely of the proper interpretation of the Natural Gas Act. This time we must determine the interplay of §§ 4 and 7. These sections are the avenues through which the natural gas producer may, by contract or otherwise, initially propose the dedication of his natural gas supply to interstate movement (§ 7) and, once so dedicated by order of the Federal Power Commission, thereafter initiate changes in existing rates (§ 4). We will proceed with separate analyses of these two sections.

Section 7 (c) came into the Natural Gas Act in 1942 and provides the method by which gas may be dedicated

and certificated into interstate commerce. It prohibits a natural gas producer from engaging in the transportation or sale of natural gas "unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." In order to secure such certificates, applications are filed with the Commission and in due course the applicants are afforded a hearing. Sections 7 (c) and (e) of the Act command that a certificate shall be issued if the Commission finds it "required by the present or future public convenience and necessity" and if the applicant meets certain tests of reliability, such as ability and willingness to perform. In issuing such certificates, the Commission has "the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." § 7 (e).

Hearings under § 7 (e) for permanent certification are time consuming. The Congress, realizing this, provided in § 7 (c) that "the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." Pursuant to this authorization the Commission adopted a regulation which sets out standards for emergency authorizations and requires the applicant to file "a statement of intention to invoke this section." 18 CFR § 157.28 (c). The Commission grants the temporary certificate, where it deems necessary, without notice or hearing. Under the terms of the regulation, this authorization continues until final Commission action under §§ 4 and 7, "without preju-

dice to such rate or other condition as may be attached to the issuance of the certificate." 18 CFR § 157.28.

It must be noted, however, that § 7 does not stipulate that the Commission must find the initial rate to be just and reasonable but simply that the service proposed is required by the present and future public convenience and necessity. Nor does § 7 grant the Commission power to suspend the rate authorized in permanent or temporary certificates issued under that section. Once a permanent certificate is granted the Commission can correct an improper rate only under § 5 of the Act, 52 Stat. 823, 15 U. S. C. § 717d, which likewise has no suspension provision. In the light of this inability to suspend the initial rate granted under a § 7 certificate, the Commission attaches conditions to the certificate of authority which it deems necessary to afford consumers the "complete, permanent and effective bond of protection from excessive rates and charges" for which we found the Act was framed in *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U. S. 378, 388 (1959). "The heart of the Act," we said there, was in those provisions of § 7 (e) "requiring initially that any 'proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity' . . . and that all rates and charges 'made, demanded, or received' shall be 'just and reasonable,' § 4, 15 U. S. C. § 717c." In this case, the Commission concluded that when granting temporary certificates it must look even more carefully to the present and future public convenience and necessity and interpose such conditions precedent as would, in its view, fully protect consumers from excessive rates and charges.

Section 4 was included in the original Act of 1938. 52 Stat. 822, 15 U. S. C. § 717c. It provides in part that "no change shall be made by any natural-gas company in

any . . . rate . . . except after thirty days' notice to the Commission and to the public." § 4 (d). Whenever such new rate is filed, the Commission may, after notice, hold hearings to determine whether the rate is lawful and may suspend its operation, but only for a period of five months. § 4 (e). If the proceeding is not concluded within those five months, the proposed rate becomes effective and collectible, subject to subsequent refund by the natural gas company to the extent the rate is not just and reasonable. As we said in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 341 (1956), the power granted to the Commission "is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them." And we specifically pointed out that all § 4 (e) does "is to add to this basic power, in the case of a newly changed rate . . . the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective." *Ibid.* The power granted to the Commission in § 4 does not come into play until after the initial certification of the natural gas into interstate commerce has been granted under § 7.

In the instant case no permanent certificates authorizing sales in interstate commerce have yet been issued. Temporary certificates have been allowed and each is conditioned upon the maintenance of the initial price. Thus, if respondents' position is correct, then the conditions precedent to the issuance of the temporary certificates required by the Commission can be nullified by subsequent independent action of the respondents in filing a new contract under § 4. We do not believe that the Congress intended any such incongruous result.

III.

We find no conflict in the directives of the two sections. Indeed, they supplement one another and thereby work together in efficient conjunction to carry out the purposes of the Act. When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of § 7. His natural gas must be certificated before it can move into interstate commerce. If he wishes to avoid the delay incident to a hearing for a permanent certificate he may apply for temporary authorization, which may be granted upon *ex parte* application. In view of this, the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be continued unchanged until the permanent certificate is issued.

Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate-filing procedure of that section.

This Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra.* There we indicated that the Commission might avail itself of its power to condition the initial certification of natural gas into interstate commerce in order to prevent a triggering of general price rises. The language is unmistakably clear as to the

claim made here that the vitality of § 4 of the Act is being impaired and we therefore repeat and reaffirm it:

> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." At 391–392.

Nor is it any answer to say that the suspension power under § 4 (e) will afford protection to the public. The experience since our opinion in *Atlantic Refining Co., supra,* indicates that a triggering of price rises often results from the out-of-line initial pricing of certificated gas. These effects become irreversible and splash over into intrastate sales, thus generating reciprocal pressures that directly affect jurisdictional rates. As we said in *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 154, 155 (1962), the possibility of refund does not afford sufficient protection:

> "True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory . . . . It is, therefore, the duty of the Commission to look at 'the backdrop of the practi-

cal consequences [resulting] . . . and the purposes of the Act,' *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U. S. 137, 147 (1960), in exercising its discretion under § 16 to issue interim orders . . . ."

IV.

Our interpretation of the power of the Commission under §§ 7 (c) and (e) is buttressed by the legislative history. They were added to the Act in 1942, four years after its original passage. Prior to their adoption the only rate-making regulatory tools the Commission possessed were §§ 4 and 5, and they came into operation only after the natural gas was already moving in interstate commerce. Sections 7 (c) and (e) were designed to control the certification of gas destined for interstate movement.[2] The purpose of the amendments was to give "the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure . . . at a time when such vital matters can readily be modified as the public interest may demand. . . ." House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1290, 77th Cong., 1st Sess., 2–3. Its counterpart in the Senate likewise reported:

> "Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to 'a market in which natural gas is already being served by another natural-gas company.' Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tre-

[2] The Commission did have authority with reference to the entry of a natural gas company into a competitive market but not into new and unserviced markets.

> mendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied." Senate Committee on Interstate Commerce, S. Rep. No. 948, 77th Cong., 2d Sess., 1–2.

Clearly, the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce. Moreover, the Commission has long recognized this obligation and has required modification of many tariff and contract provisions as a condition to the granting of a certificate.[3]

The existence of broad discretionary power in the Commission to condition temporary certificates appears to us to be vital to its ability to hold the line in pricing. The extent of that power in permanent certification is not before us now, since each of these applications is for temporary certification. It is said that the condition of the Commission's docket transposes, for all practical matters,

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[3] See, *e. g., Florida Economic Advisory Council* v. *Federal Power Comm'n*, 102 U. S. App. D. C. 152, 251 F. 2d 643, cert. denied, 356 U. S. 959; *Northern Natural Gas Co.*, 22 F. P. C. 164, 174–175, 180, aff'd *sub nom. Minneapolis Gas Co.* v. *Federal Power Comm'n*, 108 U. S. App. D. C. 36, 278 F. 2d 870, cert. denied, 364 U. S. 891 (certificate conditioned upon removal of clauses permitting cancellation depending on price relationship of gas and competitive fuels in gas purchase contracts upon which feasibility of pipeline project depended); *Transwestern Pipeline Co.*, 22 F. P. C. 391, 394–395, modified on rehearing, 22 F. P. C. 542 (minimum bill provisions of proposed tariff required to be modified); *Panhandle Eastern Pipe Line Co.*, 10 F. P. C. 185 (conditions requiring inclusion of interruptible rate schedules in tariffs); *Trans-Continental Gas Pipe Line Co.*, 7 F. P. C. 24, 38–40 (commencement of service conditioned upon filing of new tariff satisfactory to Commission because of disapproval of certain terms of service); *Alabama-Tennessee Natural Gas Co.*, 7 F. P. C. 257 (commencement of service conditioned upon filing of tariff satisfactory to Commission).

temporary certificates into permanent ones. This claim arises due to the delays incident to the issuance of a permanent certificate. We spoke of the "nigh interminable" delay in § 5 proceedings in *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* at 389. There delay operated against the consumer. Here it operates against the producer. The Commission has been making efforts in this regard, through the establishment of guidelines for determining initial prices and other administrative devices. 43 F. P. C. Ann. Rep. 13, 119–120 (1963). However, we again call to its attention the dangers inherent in the accumulation of a large backlog of cases with its accompanying irreparable injury to the parties. Moreover, consumers may become directly affected thereby through the reluctance of producers to enter interstate markets because of the long delay incident to permanent certification. Procedures must be worked out, not only to clear up this docket congestion, but also, to maintain a reasonably clear current docket so that hearings may be had without inordinate delay. In this connection the techniques of the National Labor Relations Board might be studied with a view to determining whether its exemption practices, see *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1, 3–4 (1957), might be helpful in the solution of the Commission's problems.

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

While the result reached by the Court may be thought desirable, I can find no justification for it either in the Natural Gas Act or in any of the prior decisions of this Court. The matter is one for Congress. I would affirm the judgments below substantially for the reasons given by Judge Brown in his convincing opinion for the Court of Appeals. 306 F. 2d 334.

RUGENDORF *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 223. Argued February 27, 1964.—Decided March 30, 1964.

Petitioner was convicted of knowingly concealing stolen fur garments in violation of 18 U. S. C. § 2315. The stolen furs were found in the basement of his home pursuant to a search warrant issued on the strength of an affidavit factually inaccurate in two respects and based partly on hearsay statements of confidential informants. Petitioner's motion to suppress the introduction in evidence of the seized furs was denied by the trial court. *Held:*

1. The search warrant was valid as long as it provided a substantial basis to support the conclusion that the stolen goods were probably in petitioner's basement. Pp. 531–533.

(a) Factual inaccuracies, not going to the integrity of the affidavit, do not destroy probable cause for a search. Pp. 532–533.

(b) Hearsay, if it provides sufficient evidence of probable cause, justifies the issuance of a search warrant. *Jones* v. *United States*, 362 U. S. 257, followed. P. 533.

2. Petitioner's claim that he was entitled to the informant's name in order to defend himself at the trial must be rejected where first raised in petitioner's reply brief on appeal, his previous request having been confined to support of his motion to suppress the evidence. Pp. 534–536.

3. The evidence was sufficient to support the verdict. Pp. 536–537.

316 F. 2d 589, affirmed.

Julius Lucius Echeles argued the cause for petitioner. With him on the briefs were *Melvin B. Lewis* and *Howard W. Minn.*

David C. Acheson argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Frank Goodman* and *Philip R. Monahan.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Following a trial by jury, petitioner was convicted of violating 18 U. S. C. § 2315 [1] by knowingly receiving, concealing and storing 81 stolen fur pieces, the fur pieces having been transported in interstate commerce and having a value exceeding $5,000. The Court of Appeals sustained the conviction despite petitioner's objections that the evidence was not sufficient to support the verdict; that the fur garments should have been excluded from evidence because they were seized on the authority of a search warrant supported by a deficient affidavit; and that the names of certain confidential informants referred to in the affidavit should have been disclosed. 316 F. 2d 589. We granted certiorari, 375 U. S. 812, and affirm the judgment.

I.

The search warrant under attack was issued by the United States Commissioner on the strength of an affidavit dated March 22, 1962, and signed by Marlin Moore, a Special Agent of the Federal Bureau of Investigation. The affidavit stated that Moore had reason to believe that approximately 80 fur stoles and jackets, taken in a burglary in Mountain Brook, Alabama, and worth about $40,000, were concealed in the basement of a single family residence at 3117 West Jarvis Avenue in Chicago.

[1] 18 U. S. C. § 2315:

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . .

. . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Moore supported this allegation with statements that L. Dean Paarmann, a Special Agent of the Birmingham, Alabama, Office of the FBI, informed Moore that on February 10, 1962, 82 mink, otter, and beaver stoles and jackets (but no full-length coats), worth approximately $42,044, were stolen in Mountain Brook, Alabama, and that on March 16, 1962, a confidential informant who had furnished reliable information in the past told Moore that during the previous week he saw approximately 75 to 80 mink, otter and beaver stoles and jackets (but no full-length coats) in the basement of the home of Samuel Rugendorf at 3117 West Jarvis Avenue, Chicago. The labels had been removed and the informant was told that the furs were stolen.

Moore further supported the allegation with the following statements: FBI Special Agent McCormick advised affiant that a confidential informant whom the FBI had found to be reliable told McCormick that Frank Schweihs of Chicago, and others, committed the Alabama robbery; McCormick told the affiant that on or about March 1, 1962, James Kelleher, a Chicago police officer, said to McCormick "that he saw FRANK SCHWEIHS at RUGGENDORF [*sic*] BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF [*sic*] . . . ; further, Agent McCORMICK advised this affiant that another confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told McCORMICK that LEO RUGGENDORF [*sic*] was a fence for FRANK SCHWEIHS; that SAMUEL RUGGENDORF [*sic*] was LEO RUGGENDORF'S [*sic*] brother and was associated in the meat business with his brother."

The affidavit also stated that another FBI Special Agent, J. J. Oitzinger, told the affiant that another confidential informant who had supplied the FBI with reliable information in the past advised Oitzinger that Frank

Schweihs, Tony Panzica and Mike Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf.

Finally, the affidavit alleged that, upon checking the informant's description of the furs seen at 3117 West Jarvis Avenue, affiant found that the only reported burglary in the United States in the previous six months involving furs of that description and value was the one occurring at Mountain Brook, Alabama.

Pursuant to the search warrant based on this affidavit, a search was made and 81 furs were found in the basement of petitioner's residence. Fifty-nine of these furs had been stolen in Mountain Brook and the other 22, in Shreveport, Louisiana. Prior to trial, the trial court heard testimony on petitioner's motion, under Rule 41 (e) of the Federal Rules of Criminal Procedure,[2] to suppress the use of the seized furs as evidence. The trial court denied the motion insofar as it challenged the legal sufficiency of the affidavit, but reserved ruling on the truthfulness of the affidavit. During the trial, another hearing was held on the reserved aspect of the motion to suppress and the motion was denied. Also denied was a motion to require the Government to disclose the names of the confidential informants referred to in the affidavit.

II.

Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to

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[2] Rule 41 (e) of the Federal Rules of Criminal Procedure:

"*Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued . . . ."

which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. Petitioner contends that probable cause did not exist because the only relevant recitations in the affidavit were the one informant's statements that he saw the furs in petitioner's basement and that he was told that they were stolen. However, the informant's detailed description of the furs, including number and type, closely resembled Special Agent Paarmann's description of the furs stolen in Alabama. The affiant checked the burglary report records and found the Alabama burglary to be the only recent one in the United States involving furs of the description and number that the informant saw in petitioner's basement. In addition, the affidavit alleged that Leo and Samuel Rugendorf were brothers and that Leo was a fence for professional burglars. Although one of the informants who gave the latter information added, incorrectly, that Samuel Rugendorf was associated with Leo in the meat business,[3] there was direct information from another informant of the FBI that Leo was a fence, and nothing was shown to prove this untrue. The factual inaccuracies depended upon by petitioner to destroy probable cause—*i. e.*, the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit.

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[3] In fact, petitioner terminated his business association with his brother Leo and with Rugendorf Brothers Meat Market in 1952.

We believe that there was substantial basis for the Commissioner to conclude that stolen furs were probably in the petitioner's basement. No more is required. As we said in *Jones* v. *United States,* 362 U. S. 257, 271 (1960):

> "We conclude . . . that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay . . . that the Commissioner acted improperly. . . . He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient."

Petitioner also contends that the withholding of the identities of the informants was a sufficient ground to require suppression of the evidence. But in *Jones, supra,* we said that "as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants . . . to be produced . . . so long as there was a substantial basis for crediting the hearsay." At 272. Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant,[4] they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant.

[4] The affidavit alleged that McCormick told the affiant that Police Officer Kelleher told him that petitioner was the manager of Rugendorf Brothers Meat Market and that a confidential informant told McCormick that Leo and petitioner were associated in the meat business. Kelleher testified that he did not so inform McCormick. The latter was in the hospital for an operation at the time of trial, but his deposition was not sought nor any postponement requested to enable him to be present.

III.

Petitioner also asserts that he was entitled to the name of the informer who reported seeing the furs in his basement in order to defend himself at trial on the merits. This claim was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here. On two occasions—once prior to and the other during the trial—petitioner urged his motion to suppress the evidence as to the furs, contending that there were "factual errors" in the affidavit supporting the search warrant. It was solely in support of this motion—not on the merits—that petitioner requested all of the informants' names. This is made clear by petitioner's motion for new trial:

> "9. The court erred in overruling the defendant's motion for the government to reveal the names of the informers when such information was necessary to the constitutional rights of the defendant *in pursuing his motion to suppress the evidence.*" (Emphasis added.)

He relied entirely on suppression, which, if successful, would have ended the case. Failing in this, petitioner asserted, for the first time, in his reply brief in the Court of Appeals that the name of the single informant who saw the furs was vital both for the suppression hearing and for the defense at trial, because the informant alone knew whether he "participated with persons other than the defendant" in placing the furs in the basement. Apparently this was an attempt to bring the facts of the case within *Roviaro* v. *United States,* 353 U. S. 53 (1957), where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted. But there was not even an intimation of such a situation at the trial here. The necessity for disclosure depends upon "the particular circumstances of each case, taking into consid-

eration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U. S. 53, 62. Petitioner did not develop any such criteria with reference to the merits of the case. On the contrary, a careful examination of the whole record shows that he requested the informers' names only in his attack on the affidavit supporting the search warrant. Having failed to develop the criteria of *Roviaro* necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense. All petitioner's demands for identification of the informants were made during the hearings on the motion to suppress and were related to that motion.[5] Never did petitioner's counsel indicate how the informants' testimony could help establish petitioner's innocence.

Nor do we believe that the trial court erred in refusing to have the Government disclose the exact date during the week preceding March 16 when the informant saw the

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[5] It was during the hearing on the motion prior to trial that petitioner cited *United States* v. *Pearce*, 275 F. 2d 318; *Giordenello* v. *United States*, 357 U. S. 480; and *Roviaro* v. *United States*, 353 U. S. 53. His counsel said: "That is, Giordinella [*sic*] states that the defendant has a right to have such hearing [on suppression]. Pierce [*sic*] and Roviera [*sic*] state we have a right in advance of the hearing to demand the names of the informers if the names are essential to the defense of the defendant *in the prosecution of his petition to suppress the evidence.*" (Emphasis supplied.) And on the second hearing when the Government offered the furs in evidence he again urged his motion, in the absence of the jury, introducing evidence showing the "factual errors" in the affidavit. On arguing the motion, petitioner's counsel said: "Here is what Pierce [*sic*] says, and here is what United States v. Roviera [*sic*] says: 'When it is demonstrated to the Court that it is essential to the defendant's rights, constitutional rights, that information be given to him so that he can test the validity of the affidavit,' then it must be given to him." Clearly his reliance on *Roviaro* for suppression purposes, which was the sole reason for which it was cited, was entirely misplaced.

furs in the petitioner's basement. It is difficult to see how that date could be useful to petitioner's defense, since the crucial date in the indictment was March 22 and there is no indication that the informant had any knowledge of any events occurring on that date. Petitioner's theory is that if he can find out the date, he may be able to show that he and his wife were away from home at the time when the informant saw the furs, thereby creating an inference that someone else let the informant in and that petitioner did not know of the furs. However, the particular date could not have been of material help to petitioner, as both he and his wife were away from home a major portion of nearly every day during the period in question.

IV.

As to the sufficiency of the evidence, it was undisputed that 81 stolen furs were found in the basement of petitioner's home. The furs were hanging in a closet along with a fur piece admittedly owned by Mrs. Rugendorf. Petitioner's defense was that the furs were placed in the closet without his knowledge while he and his wife were vacationing in Florida and that neither he nor his wife looked into the closet after their return until the officers executed the search warrant on March 22. Petitioner's brother Leo, petitioner's sister, his son and a neighbor all had keys to his house. Both petitioner and his wife pointed to Leo as the guilty party, but neither Leo nor the other relatives who had keys were called as witnesses. The neighbor, who was called to testify, denied putting the furs in the basement or permitting any other person to use the key.

As early as 1896 this Court dealt with such situations. In *Wilson* v. *United States*, 162 U. S. 613, Chief Justice Fuller held for a unanimous Court that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and,

though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." At 619. Here, it was stipulated that 59 of the furs found in the petitioner's basement were stolen from a fur store in Mountain Brook, Alabama, on February 10, 1962. They were found in a closet opening off a regularly used recreation room. In the same closet was Mrs. Rugendorf's fur piece. Leo Rugendorf, petitioner's brother, was a known receiver of stolen goods and was seen at the home while the Rugendorfs were in Florida. Petitioner testified at trial that Leo had borrowed a key before petitioner went to Florida, and that Leo had not yet returned it. In rebuttal an FBI agent testified that petitioner told him that Leo returned the key soon after the petitioner returned from Florida. In some other respects the testimony of both petitioner and his wife conflicted with the rebuttal testimony of the FBI agents. Apparently the jury simply did not believe the explanation of petitioner and his wife. It may be that the jury's credulity was stretched too far; or, perhaps the failure of the defense to call Leo Rugendorf and the other kinsmen, to whom they had given keys to the home, appeared strange, especially so, since the neighbor was called to testify about his use of a key. In any event a prima facie case was made out by the stipulation and the presence of the furs in petitioner's home. We cannot say that this was insufficient.

Affirmed.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG concur, dissenting.

Just prior to the presentation by the prosecution of its first witness at the trial, counsel for petitioner re-

quested the name or names of the informers mentioned in the search warrant:

> "Mr. Echeles: *Roviaro* v. *United States* [353 U. S. 53], which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. The Government has no reason not to give it, said *Roviaro,* and that is the controlling law.
>
> "Let me demonstrate how in our opinion the names of the informants are necessary."

Counsel then went on to argue why disclosure of one informant's name was essential to his motion to suppress. Then he shifted to another attack stating:

> *"I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it,* or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government. [Italics added.]
>
> "In any event, your Honor, I rely upon United States v. Pearce, 275 F. 2d, our Circuit. I rely upon Roviaro v. United States, 353 U. S. 53. And I rely upon Giordenello v. United States, 357 U. S. 480, as being the proper procedure that I am trying to get here, your Honor."

It is impossible to say that this motion related wholly to quash the search warrant. It is true that *Pearce* and *Giordenello* involved such motions. But *Roviaro* did not.

Rather it presented the same issue this case presents, *viz.*, whether the "informer's privilege," 353 U. S., at 59, must give way in the interests of the defense of the accused.

The prosecutor objected, saying "that if the Government is to reveal the name of any informants they might be and probably would be killed."

The trial judge denied the motion and the trial started. During the trial the request was repeated, counsel for petitioner saying "I need that information to defend my defendant, your Honor." Whatever defect, if any, may have been present in his first motion did not appear this time. For now he was plainly addressing himself to the trial on the merits. Once again his request was denied.

It is obvious that these requests were made not only to challenge the sufficiency of the affidavit as a basis of the search warrant, but also for use on the issue of guilt or innocence—*viz.*, knowing possession of stolen goods. The issue was considered by the Court of Appeals,* 316 F. 2d 589, 592; and we should do the same.

Petitioner and his wife were in Florida on vacation between February 17 and March 4, 1962. Before they

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*The majority states that the demand for disclosure as it related to a defense on the merits "was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here." *Ante*, at 534. But the trial excerpts reproduced above amply rebut that contention as it relates to the trial. And the Court of Appeals expressly said:

"The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on Roviaro v. United States, 353 U. S. 53." 316 F. 2d 589, 592.

As already noted, *Roviaro* did not involve a challenge to the sufficiency of a search warrant. It presented the issue this case does. One requesting disclosure and citing *Roviaro* as authority obviously is seeking to bring himself within the situation to which the *Roviaro* rule is applicable.

left Chicago petitioner's brother Leo—an admitted "fence" for stolen goods—came to his house to see him:

> "Leo asked who was going to look after the mail, clean the sidewalks and everything else and he told Leo that his son Jerry would do it. Leo said that Jerry had to open the store every morning and stated that he got down a little later every day and so why not let him watch the house and bring in the mail. Accordingly, he gave his brother the keys.
>
> "From that day, on February 17, 1962, until this day [the time of the trial] he had not seen or talked to his brother Leo; nor had Leo returned the key."

Leo, the brother, had one key to the house during petitioner's absence. His sister, his son, and a neighbor also had keys. Since one of these was a known criminal, and since the informant had personally been in the basement of petitioner's home, the pertinency of the inquiry as to the informant's name becomes obvious.

Speaking of the "informer's privilege," we said in *Roviaro* v. *United States*, 353 U. S. 53, 59: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

But there are times when the privilege must give way. In *Roviaro*, we put one of those exceptions in these words: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.*, at 60–61.

It is difficult to imagine a clearer case than the present one for application of that exception.

The Solicitor General seeks to avoid that conclusion by saying that even though the informant might disclose who stole the furs and how they reached the defendant's basement, "this would not necessarily have cast light upon the issue of petitioner's knowledge." The Solicitor General also argues that it is highly conjectural that identification of the person who admitted the informant to the basement would materially illuminate the question of petitioner's knowledge. We have, however, a case where the only proof implicating defendant was discovery of the stolen furs in his basement. Four keys to the house were in the hands of outsiders, one of whom had a criminal record for trafficking in stolen goods; the stolen furs may have reached defendant's basement during his absence and remained there without his knowledge. His only defense would be proof that someone without his knowledge put them there. Who that person was, when he placed the furs in the basement, what his motivations were in placing the furs there, what his relations with the defendant were, what connections he had with the stolen articles—these questions go to the very heart of the defense. *Roviaro* would, therefore, require in the exercise of sound discretion disclosure of the informant. Unless we allow that amount of leeway, we can only rest uneasy in the thought that we are helping send an innocent man to prison.

The Court does not face up to this crucial issue because, with due respect, it takes a Baron Parke approach when examining the record, the motions made, and the exceptions taken; and it concludes that the proper talismanic words were not used when the request for the informant's name was made. But that attitude belongs to an ancient regime, not to the one we administer under Rule 52 (b) of the Federal Rules of Criminal Procedure (see *Silber* v.

United States, 370 U. S. 717), which provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Our Rule 40 (1)(d)(2) is to the same effect. Enough has been said to show that the issue was squarely raised in the trial court and squarely passed upon by the Court of Appeals. But if it is assumed *arguendo* that the point was not squarely raised, few clearer cases for applying Rule 52 (b) have appeared, at least in recent years.

Syllabus.

JOHN WILEY & SONS, INC., *v.* LIVINGSTON, PRESIDENT OF DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL–CIO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 91. Argued January 9, 13, 1964.—Decided March 30, 1964.

Respondent labor union brought an action under § 301 of the Labor Management Relations Act to compel arbitration under a collective bargaining agreement executed by a company which the petitioner acquired by merger. The District Court denied relief but the Court of Appeals reversed and directed arbitration. *Held:*

1. The courts determine whether arbitration is required, based on the agreement. *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, followed. Pp. 546–547.

2. The substantive law which controls suits under § 301 of the Act is federal law. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, followed. P. 548.

3. Rights of employees under a collective bargaining agreement are not automatically lost by the disappearance by merger of the employer, and in appropriate circumstances the successor employer may be required to arbitrate under the contract. P. 548.

4. Arbitration has a key role in effectuating national labor policy; and when there is substantial continuity of identity in the business enterprise and a clear assertion by the union of rights under the agreement, the duty to arbitrate survives the merger. Pp. 549–551.

5. Procedural questions growing out of a dispute and bearing on its disposition are to be determined by the arbitrator. Pp. 555–559.

313 F. 2d 52, affirmed, in part on other grounds.

Charles H. Lieb argued the cause for petitioner. With him on the briefs was *Robert H. Bloom.*

Irving Rozen argued the cause for respondent. With him on the brief was *Milton C. Weisman.*

Thomas E. Harris argued the cause for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae*, urging affirmance. On the brief were *J. Albert Woll, David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Michael H. Gottesman.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is an action by a union, pursuant to § 301 of the Labor Management Relations Act, 61 Stat. 136, 156, 29 U. S. C. § 185, to compel arbitration under a collective bargaining agreement. The major questions presented are (1) whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer, and, if so, (2) whether the courts or the arbitrator is the appropriate body to decide whether procedural prerequisites which, under the bargaining agreement, condition the duty to arbitrate have been met. Because of the importance of both questions to the realization of national labor policy, we granted certiorari (373 U. S. 908) to review a judgment of the Court of Appeals directing arbitration (313 F. 2d 52), in reversal of the District Court which had refused such relief (203 F. Supp. 171). We affirm the judgment below, but, with respect to the first question above, on grounds which may differ from those of the Court of Appeals, whose answer to that question is unclear.

I.

District 65, Retail, Wholesale and Department Store Union, AFL–CIO, entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. The agreement did not contain an express provision making it binding on successors of Interscience. On October 2,

1961, Interscience merged with the petitioner, John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity. There is no suggestion that the merger was not for genuine business reasons.

At the time of the merger Interscience had about 80 employees, of whom 40 were represented by this Union. It had a single plant in New York City, and did an annual business of somewhat over $1,000,000. Wiley was a much larger concern, having separate office and warehouse facilities and about 300 employees, and doing an annual business of more than $9,000,000. None of Wiley's employees was represented by a union.

In discussions before and after the merger, the Union and Interscience (later Wiley) were unable to agree on the effect of the merger on the collective bargaining agreement and on the rights under it of those covered employees hired by Wiley. The Union's position was that despite the merger it continued to represent the covered Interscience employees taken over by Wiley, and that Wiley was obligated to recognize certain rights of such employees which had "vested" under the Interscience bargaining agreement. Such rights, more fully described below, concerned matters typically covered by collective bargaining agreements, such as seniority status, severance pay, etc. The Union contended also that Wiley was required to make certain pension fund payments called for under the Interscience bargaining agreement.

Wiley, though recognizing for purposes of its own pension plan the Interscience service of the former Interscience employees, asserted that the merger terminated the bargaining agreement for all purposes. It refused to recognize the Union as bargaining agent or to accede to the Union's claims on behalf of Interscience employees. All such employees, except a few who ended their Wiley employment with severance pay and for

whom no rights are asserted here, continued in Wiley's employ.

No satisfactory solution having been reached, the Union, one week before the expiration date of the Interscience bargaining agreement, commenced this action to compel arbitration.

II.

The threshold question in this controversy is who shall decide whether the arbitration provisions of the collective bargaining agreement survived the Wiley-Interscience merger, so as to be operative against Wiley. Both parties urge that this question is for the courts. Past cases leave no doubt that this is correct.[1] "Under our decisions,

[1] Wiley argues that the Court of Appeals decided that the effect of the merger on the obligation to arbitrate was a question for the arbitrator. The opinion below is unclear. It first states that "the question of 'substantive arbitrability' is for the court not for the arbitrator to decide." 313 F. 2d, at 55. At another point, it says: "We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract." 313 F. 2d, at 56–57.

Elsewhere, however, the opinion states: ". . . [W]e think and hold . . . that it is not too much to expect and require that this employer proceed to arbitration with the representatives of the Union to determine whether the obligation to arbitrate regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation." 313 F. 2d, at 57 (footnote omitted). Judge Kaufman, concurring separately, plainly thought that the court had left to the arbitrator the question of whether Wiley was obligated to arbitrate at all. 313 F. 2d, at 65, 66.

whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241. Accord, *e. g., United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582. The problem in those cases was whether an employer, concededly party to and bound by a contract which contained an arbitration provision, had agreed to arbitrate disputes of a particular kind. Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision. The reason requiring the courts to determine the issue is the same in both situations. The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.

The unanimity of views about who should decide the question of arbitrability does not, however, presage the parties' accord about what is the correct decision. Wiley, objecting to arbitration, argues that it never was a party to the collective bargaining agreement, and that, in any event, the Union lost its status as representative of the former Interscience employees when they were mingled in a larger Wiley unit of employees. The Union argues that Wiley, as successor to Interscience, is bound by the latter's agreement, at least sufficiently to require it to arbitrate. The Union relies on § 90 of the N. Y. Stock Corporation Law, which provides, among other things, that no "claim or demand for any cause" against a con-

stituent corporation shall be extinguished by a consolidation.[2] Alternatively, the Union argues that, apart from § 90, federal law requires that arbitration go forward, lest the policy favoring arbitration frequently be undermined by changes in corporate organization.

Federal law, fashioned "from the policy of our national labor laws," controls. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456. State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case, *id.*, at 457, but the law which ultimately results is federal. We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.

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[2] "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending."

This Court has in the past recognized the central role of arbitration in effectuating national labor policy. Thus, in *Warrior & Gulf Navigation Co., supra,* at 578, arbitration was described as "the substitute for industrial strife," and as "part and parcel of the collective bargaining process itself." It would derogate from "the federal policy of settling labor disputes by arbitration," *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U. S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same.

Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . . of the contending forces," *Warrior & Gulf, supra,* at 580.

The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations com-

pellingly so demanded. We find none. While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party,[3] a collective bargaining agreement is not an ordinary contract. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *Warrior & Gulf, supra,* at 578–579 (footnotes omitted). Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, see *id.,* at 580, and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate, as we have said, *supra,* pp. 546–547, must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[4] This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience

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[3] But cf. the general rule that in the case of a merger the corporation which survives is liable for the debts and contracts of the one which disappears. 15 Fletcher, Private Corporations (1961 rev. ed.), § 7121.

[4] Compare the principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that "an interpretation that covers the asserted dispute," *Warrior & Gulf, supra,* pp. 582–583, be favored.

contract construed in the context of a national labor policy.

We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. So too, we do not rule out the possibility that a union might abandon its right to arbitration by failing to make its claims known. Neither of these situations is before the Court. Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty. The Union made its position known well before the merger and never departed from it. In addition, we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. See, *e. g.*, *Labor Board* v. *Aluminum Tubular Corp.*, 299 F. 2d 595, 598–600; *Labor Board* v. *McFarland*, 306 F. 2d 219; *Cruse Motors, Inc.*, 105 N. L. R. B. 242, 247. This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement.[5]

[5] The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633*, v. *Lion Dry*

III.

Beyond denying its obligation to arbitrate at all, Wiley urges that the Union's grievances are not within the scope of the arbitration clause. The issues which the Union sought to arbitrate, as set out in the complaint, are:

> "(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.
>
> "(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.
>
> "(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.
>
> "(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.
>
> "(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract."

Goods, Inc., 369 U. S. 17. There is no problem of conflict with another union, cf. *L. B. Spear & Co.*, 106 N. L. R. B. 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees.

Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because of rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant.

Section 16.0 of the collective bargaining agreement provides for arbitration as the final stage of grievance procedures which are stated to be the "sole means of obtaining adjustment" of "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement . . . ." There are a number of specific exceptions to the coverage of the grievance procedures, none of which is applicable here.[6] Apart from them, the intended wide breadth of the arbitration clause is reflected by § 16.9 of the agreement which provides, with an irrelevant exception:

> ". . . [T]he arbitration procedure herein set forth is the sole and exclusive remedy of the parties hereto and the employees covered hereby, for any claimed violations of this contract, and for any and all acts or omissions claimed to have been committed by either party during the term of this agreement, and such arbitration procedure shall be (except to enforce, vacate, or modify awards) in lieu of any and all other remedies, forums at law, in equity or otherwise which will or may be available to either of the parties. . . ."

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[6] Section 16.5 provides:

"It is agreed that, in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions, the following matters shall not be subject to the arbitration provisions of this agreement:

"(1) the amendment or modification of the terms and provisions of this agreement;

"(2) salary or minimum wage rates as set forth herein;

"(3) matters not covered by this agreement; and

"(4) any dispute arising out of any question pertaining to the renewal or extension of this agreement."

Other provisions of the agreement "which expressly deny arbitration to specific events" are §§ 4.2, 4.4, 6.4.1, 14.4, 16.9.

All of the Union's grievances concern conditions of employment typically covered by collective bargaining agreements and submitted to arbitration if other grievance procedures fail. Specific provision for each of them is made in the Interscience agreement.[7] There is thus no question that had a dispute concerning any of these subjects, such as seniority rights or severance pay, arisen between the Union and Interscience prior to the merger, it would have been arbitrable. Wiley argues, however, that the Union's claims are plainly outside the scope of the arbitration clause: first, because the agreement did not embrace post-merger claims, and, second, because the claims relate to a period beyond the limited term of the agreement.

In all probability, the situation created by the merger was one not expressly contemplated by the Union or Interscience when the agreement was made in 1960. Fairly taken, however, the Union's demands collectively raise the question which underlies the whole litigation: What is the effect of the merger on the rights of covered employees? It would be inconsistent with our holding that the obligation to arbitrate survived the merger were we to hold that the fact of the merger, without more, removed claims otherwise plainly arbitrable from the scope of the arbitration clause.

It is true that the Union has framed its issues to claim rights not only "now"—after the merger but during the term of the agreement—but also after the agreement expired by its terms. Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause; we do not understand Wiley to urge that the Union's claims to all such rights have become

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[7] See Art. VI: Seniority; Art. XV: Welfare Security Benefits; Art. VII: Discharges and Lay-offs; Art. XXIII: Severance Pay; Art. XII: Vacations.

moot by reason of the expiration of the agreement.[8] As to claimed rights "after January 30, 1962," it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement.[9] We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired. Of course, the Union may not use arbitration to acquire new rights against Wiley any more than it could have used arbitration to negotiate a new contract with Interscience, had the existing contract expired and renewal negotiations broken down.

Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction. See *Warrior & Gulf, supra,* at 582–583.

IV.

Wiley's final objection to arbitration raises the question of so-called "procedural arbitrability." The Interscience agreement provides for arbitration as the third stage of the grievance procedure. "Step 1" provides for "a conference between the affected employee, a Union Steward and the Employer, officer or exempt supervisory person

[8] Wiley apparently concedes the possibility that a right to severance pay might accrue before the expiration of the contract but be payable "at some future date." Brief, p. 38.

[9] Wiley apparently so construes at least part of one of the Union's claims. See note 8, *supra.*

in charge of his department." In "Step 2," the grievance is submitted to "a conference between an officer of the Employer, or the Employer's representative designated for that purpose, the Union Shop Committee and/or a representative of the Union." Arbitration is reached under "Step 3" "in the event that the grievance shall not have been resolved or settled in 'Step 2.' "[10] Wiley argues that since Steps 1 and 2 have not been followed, and since the duty to arbitrate arises only in Step 3, it has no duty to arbitrate this dispute.[11] Specifically, Wiley urges that the question whether "procedural" conditions to arbitration have been met must be decided by the court and not the arbitrator.[12]

We think that labor disputes of the kind involved here cannot be broken down so easily into their "substantive" and "procedural" aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dis-

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[10] All of these provisions are contained in § 16.0 of the Interscience agreement.

[11] In addition to the failure to follow the procedures of Steps 1 and 2, Wiley objects to the Union's asserted failure to comply with § 16.6, which provides: "Notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance."

[12] The Courts of Appeals have disagreed on this issue. The First and Seventh Circuits have held that the courts determine whether procedural conditions to arbitration have been met. *Boston Mutual Life Ins. Co.* v. *Insurance Agents' Int'l Union*, 258 F. 2d 516; *Brass & Copper Workers Federal Labor Union No. 19322* v. *American Brass Co.*, 272 F. 2d 849. The Third, Fifth, and Sixth Circuits agree with the Second Circuit's decision in this case that the question of "procedural arbitrability" is for the arbitrator. *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105; *Deaton Truck Line, Inc.*, v. *Local Union 612*, 314 F. 2d 418; *Local 748* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192.

pute about the rights of the parties to the contract or those covered by it. In this case, for example, the Union argues that Wiley's consistent refusal to recognize the Union's representative status after the merger made it "utterly futile—and a little bit ridiculous to follow the grievance steps as set forth in the contract." Brief, p. 41. In addition, the Union argues that time limitations in the grievance procedure are not controlling because Wiley's violations of the bargaining agreement were "continuing." These arguments in response to Wiley's "procedural" claim are meaningless unless set in the background of the merger and the negotiations surrounding it.

Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. In this case, one's view of the Union's responses to Wiley's "procedural" arguments depends to a large extent on how one answers questions bearing on the basic issue, the effect of the merger; *e. g.*, whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract. It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.

Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Even under a contrary rule, a court

could deny arbitration only if it could confidently be said not only that a claim was strictly "procedural," and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award. In view of the policies favoring arbitration and the parties' adoption of arbitration as the preferred means of settling disputes, such cases are likely to be rare indeed. In all other cases, those in which arbitration goes forward, the arbitrator would ordinarily remain free to reconsider the ground covered by the court insofar as it bore on the merits of the dispute, using the flexible approaches familiar to arbitration. Reservation of "procedural" issues for the courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort.

In addition, the opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay created by separation of the "procedural" and "substantive" elements of a dispute are clear. While the courts have the task of determining "substantive arbitrability," there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's position would produce the delay attendant upon judicial proceedings preliminary to arbitration. As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy.

No justification for such a generally undesirable result is to be found in a presumed intention of the parties. Refusal to order arbitration of subjects which the parties

have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted. Although a party may resist arbitration once a grievance has arisen, as does Wiley here, we think it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play.

With the reservation indicated at the outset (p. 544 and p. 546, note 1, *supra*), the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

MRVICA *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 353. Argued March 5, 1964.—Decided March 30, 1964.

An alien seaman, who first entered this country in January 1940, and who left as a seaman on a foreign ship in October 1942 after a warrant for his deportation was issued, who then returned and has remained here since December 1942, has not had continuous residence in the United States since his original entry, within the meaning of § 249 of the Immigration and Nationality Act. He therefore cannot qualify under that provision for a record of lawful admission into the United States for permanent residence. Pp. 560–568.

317 F. 2d 220, affirmed.

Edith Lowenstein argued the cause and filed a brief for petitioner.

Richard W. Schmude argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Louis F. Claiborne* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case involves construction of the provisions of § 249 of the Immigration and Nationality Act, 66 Stat. 163, 219, 8 U. S. C. § 1259, which in certain circumstances permits an alien illegally in this country to apply for a record of lawful admission into the United States for permanent residence.

The petitioner is a native and citizen of Yugoslavia, who entered this country under a temporary landing per-

mit in January 1940,[1] as a nonimmigrant crewman attached to a merchant ship. He remained beyond the period allowed by the permit without permission until September 4, 1942, when a warrant for his deportation was issued. Soon thereafter, he signed as a member of the crew of a Yugoslav ship about to depart from the United States. The ship sailed with the petitioner on board on October 6, 1942, and, after calling at several ports in Chile, returned to the United States on December 19, 1942. The petitioner was detained on board ship for several days, but was then allowed to go ashore for medical treatment.[2] He has not left the country since.

In 1951, new deportation proceedings were instituted against the petitioner, whose presence in this country apparently had meanwhile gone unnoticed by the immigration authorities. He was again found subject to deportation but was granted the privilege of voluntary departure. This decision of the hearing officer was affirmed by the Assistant Commissioner, whose order became final on March 22, 1954, when the Board of Immigration Appeals entered an order dismissing the peti-

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[1] The exact date of the petitioner's entry is uncertain. Both parties state in their briefs that he entered on January 21, 1940, which is the date given by the petitioner at a deportation hearing in 1952. In the warrant for the petitioner's deportation which issued in 1942, the date of entry is given as January 25, 1940, which is the date of entry established at a deportation hearing in 1942.

[2] In his brief, the petitioner states that he came ashore "by reason of the permission granted him prior to sailing," Brief p. 4, presumably a reference to the "Ninth Proviso clause" contained in the 1942 order of deportation, which is discussed hereafter. In the hearing which preceded the later deportation order of 1952, the petitioner testified that he came ashore pursuant to special permission granted him because he was ill, which was the finding of the hearing officer. Which of these grounds was the actual basis for admission is, for reasons appearing later, immaterial to the disposition of this case.

tioner's appeal. Other proceedings followed, which ultimately resulted in 1959 in an order that the petitioner be deported to Yugoslavia. The petitioner's application for the status of a permanent resident under § 249 of the Immigration and Nationality Act was denied on the ground, explained more fully below, that his departure in 1942 made him ineligible for such discretionary relief because it deprived him of the prerequisite continuous residence in the United States since 1940. In 1960 the petitioner brought this action in the United States District Court for review of the administrative ruling and a declaratory judgment that he was eligible for relief under § 249. The District Court granted summary judgment for the respondent, 202 F. Supp. 214, which the Court of Appeals affirmed, 317 F. 2d 220. We granted certiorari, 375 U. S. 894, and now affirm the rulings below.

Section 249 of the Immigration and Nationality Act provides:

> "A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212 (a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—
>
> "(a) entered the United States prior to June 28, 1940;
>
> "(b) has had his residence in the United States continuously since such entry;

"(c) is a person of good moral character; and

"(d) is not ineligible to citizenship." 72 Stat. 546, amending 66 Stat. 219, 8 U. S. C. § 1259.[3]

It is agreed by both sides that the petitioner satisfies all the specified criteria except the requirement of continuous residence since an entry prior to June 28, 1940. The question for decision is whether his departure from the United States in 1942 and his absence from this country for several months thereafter defeat his claim to a continuous residence here since 1940.

The petitioner, whose case has been earnestly and ably pressed before us, concedes that he was ordered deported in 1942 and that his departure "executed" the order of deportation. There can be no doubt that this latter point is correct. Legislation then applicable provided that ". . . any alien ordered deported . . . who has left the United States shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." Act of March 4, 1929, § 1 (b), 45 Stat. 1551, 8 U. S. C. (1940 ed.) § 180 (b).[4]

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[3] The 1958 amendment of § 249, *inter alia*, removed the requirement that an alien applying for relief under that section not be "subject to deportation." Compare 66 Stat. 219 with 72 Stat. 546. The petitioner argues that this change indicates a legislative judgment favorable to his situation. But the humanitarian motives which may have prompted the 1958 amendment do not reach the present case, which is concerned with the requirement of continuous residence, left untouched by the amendment.

[4] This enactment was for purposes of excluding a deported alien from subsequent admission and making it a felony for such alien to enter or attempt to enter the United States. Act of March 4, 1929, §1 (a), 45 Stat. 1551, 8 U. S. C. (1940 ed.) § 180 (a). It has been carried forward in the current provisions and made applicable to the Immigration and Nationality Act generally. § 101 (g), 66 Stat. 173, 8 U. S. C. § 1101 (g).

Any possible doubt of the import of this provision is removed by H. R. Rep. No. 2418, 70th Cong., 2d Sess., 6, which explained the provision as follows:

> "Owing to the inadequacy of the appropriations now made for enforcement of deportation provisions under existing law, the Department of Labor has, in many cases, after a warrant of deportation has been issued, refrained from executing the warrant and deporting the alien, at the expense of the appropriation, to the country to which he might be deported, upon the condition that the alien voluntarily, at his own expense, leave the United States. Some doubt exists whether an alien so departing has been 'deported.' Subsection (b) of section 3 of the bill [the provision quoted above] therefore removes any possible doubt on this question by providing that in such cases the alien shall be considered to have been deported in pursuance of law."

The petitioner's departure was thus properly treated as a deportation by the Immigration and Naturalization Service, officials of which marked the warrant for deportation as "executed" and prepared papers, including a "Description of Person Deported," recording his deportation and the manner in which it was accomplished. The latter document also noted that the petitioner had a Yugoslavian passport.[5]

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[5] There is no foundation for the suggestion that in 1942 there was a special kind of departure called "reshipment" which did not have the effect of executing the outstanding deportation order. The petitioner's "reshipment" was nothing more or less than his signing on board ship and departing on it. The notation "Reshipped" on the deportation warrant was scrawled in pencil on the back of the warrant. It was made by an unidentified person for an unknown purpose, and appears underneath the endorsement of the warrant's execution by the Immigration Inspector. (More relevant in this

The petitioner challenges none of the above. He pitches his argument on the statutory definition of "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Immigration and Nationality Act, § 101 (a)(33), 66 Stat. 170, 8 U. S. C. § 1101 (a)(33). The petitioner argues that the statute makes "residence" a question of observable fact, and that, on this basis, his residence throughout the 1942 voyage must be taken as having remained in the United States. He points to various circumstances surrounding his departure which, he argues, establish that his "residence," as defined above, was not interrupted in 1942, although he was physically absent from the United States for the period of the voyage.

The facts on which the petitioner relies are of two kinds. He points first to such typical indicia of residence as the maintenance of a bank account in this country and continued membership in a domestic union. More weight, however, is placed on the inclusion in the warrant for the

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connection is the fact that the name of the ship on which the petitioner departed and the date of his departure appear in the blank for the "steamer and date *on which deported*"—italics added—on the official "Description of Person Deported.")

The petitioner had recently been through a deportation hearing. Just one month before his departure he had been ordered deported. In those circumstances, it can scarcely be maintained that he did not understand his departure to be pursuant to the warrant for his deportation. (Any doubts on this score must assuredly have been cleared up by his detention on board ship on his return.)

Indeed, discussion of the manner of the petitioner's departure seems beside the point in view of his concession that his departure executed the warrant for his deportation. (If by his departure he managed to execute the warrant for his deportation but nevertheless remain undeported, he was able to *improve* his status by leaving the country. The suggestion is untenable.)

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petitioner's deportation in 1942 of a "Ninth Proviso clause," which provided:

> "If the alien returns to the United States from time to time and upon inspection is found to be a bona fide seaman and entitled to shore leave, except for prior deportation, admission under the 9th Proviso of Section 3 of the Act of February 5, 1917, in reference to this ground of inadmissibility is hereby authorized for such time as the alien may be admitted as a seaman."

This clause, included in the warrant pursuant to statutory authority,[6] relieved the petitioner of the combined effect of provisions making arrest and deportation a basis for exclusion [7] and depriving an alien seaman subject to exclusion of landing privileges.[8] The petitioner suggests that due to wartime conditions deportation to Yugoslavia was impossible in 1942 and that the order of deportation was therefore in reality but a formality or fiction, everyone involved understanding, as the "Ninth Proviso

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[6] ". . . [T]he Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission." Act of February 5, 1917, § 3, 39 Stat. 875, 878, 8 U. S. C. (1940 ed.) § 136 (q). Similar provisions are included in the current statute. Immigration and Nationality Act, § 212 (d) (3), 66 Stat. 187, 8 U. S. C. § 1182 (d) (3).

[7] Act of March 4, 1929, § 1 (a), 45 Stat. 1551, 8 U. S. C. (1940 ed.) § 180 (a), carried forward in the Immigration and Nationality Act, §§ 212 (a) (17), 276, 66 Stat. 183, 229, 8 U. S. C. §§ 1182 (a) (17), 1326.

[8] Act of March 4, 1929, § 1 (c), 45 Stat. 1551, 8 U. S. C. (1940 ed.) § 180 (c). Compare the related provisions of the Immigration and Nationality Act, § 252 (a), 66 Stat. 220, 8 U. S. C. § 1282 (a).

clause" is said to attest, that he would be readmitted when his ship returned.

This argument contradicts what is plainly shown by the record. There is nothing in the order of deportation, in the endorsement of its "execution," or in any of the subsequent proceedings to indicate that the deportation order was not what it purported to be. No reason is suggested why the immigration authorities should have gone through a meaningless ritual of deportation for the purpose of *not* deporting the petitioner. The ameliorative clause on which the petitioner relies indicates, if anything, that the petitioner was not intended to be readmitted as a resident; his admission was conditioned on a finding that he was "a bona fide seaman and entitled to shore leave" and was authorized only "for such time as the alien may be admitted as a seaman."

Once these arguments are laid to rest, the proper disposition of this case is clear and unavoidable. By express legislative directive, the petitioner's departure in 1942 is for present purposes to be regarded as a deportation. We think it beyond dispute that one who has been deported does not continue to have his residence here, whatever may be the significance of other factors in the absence of a valid deportation. In an early case, this Court stated:

> "The order of deportation . . . is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend." *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730.

It would be quite impossible to consider that a deported alien, whose re-entry into this country within a year of deportation would be a felony,[9] nevertheless continues to reside in this country.

The obvious purpose of deportation is to terminate residence. It would defy common understanding and disregard clear legislative intent were we to hold that that purpose had not been achieved in this instance.

The judgment is

Affirmed.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

Congress humanely designed § 249 of the Immigration and Nationality Act of 1952, as amended by the Act of August 8, 1958, 72 Stat. 546, 8 U. S. C. § 1259, to permit the Attorney General, if specified conditions are satisfied, to regularize the status of certain categories of aliens illegally in the country. Among the prerequisites for obtaining permanent resident status—"registry" as it is commonly termed—are (1) entry prior to June 28, 1940, (2) continuous residence in the United States thereafter, and (3) good moral character.

The Court acknowledges that petitioner has satisfied the entry and character conditions of the statute. It holds, however, that the continuous residence requirement has not been satisfied because petitioner must be considered, as a matter of law, to have been deported in October 1942 when he sailed as a crewman aboard the Yugoslavian vessel S. S. *Dubravka* on a round trip voyage of two and a half months' duration between California and Chile.

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[9] Immigration and Nationality Act, § 276, 66 Stat. 229, 8 U. S. C. § 1326.

The difficulty with the Court's conclusion is that it rests, as I shall show, entirely on a legal fiction. I am unwilling to attribute to Congress, in enacting this remedial provision designed to regularize the status of long-resident aliens illegally in the country, an intent to deport them on the basis of legal fictions refuted by facts.

The warrant of September 4, 1942, on which the Court relies, directed petitioner's deportation to Yugoslavia. The Government concedes, as indeed it must, the "practical impossibility" of deporting petitioner to Yugoslavia in 1942 in the midst of the war. Yugoslavia was then overrun and occupied by enemy forces. Petitioner could not have been, and was not in fact, deported to Yugoslavia. The Government suggests that it could have deported petitioner to Great Britain which was then the seat of the Yugoslav Government in exile. In fact, however, while other Yugoslav seamen stranded in the United States were deported to Great Britain during the war, petitioner was not. The Government does not claim that it actually executed the warrant in this way. The warrant itself shows that petitioner was not deported to Yugoslavia, Great Britain or any other foreign country. In returning the warrant as "executed," an immigration official scribbled on its face "Reshipped." [1] He also caused to be typed after the printed word "Executed" on the warrant, "October 6th, 1942 Jogo Slav MS Dubravka." The record also contains the following telegram from

[1] The Court's statement that the notation "Reshipped" was "made by an unidentified person for an unknown purpose . . . ," is difficult to understand. *Ante*, at 564, n. 5. The notation appears on the warrant which has continuously been in the exclusive possession of the Government. That this notation could have been and was made only by an immigration official is confirmed by the telegram of October 21, 1942.

agents of the Service to the Commissioner of Immigration and Naturalization:

"Ellis Island, N. Y. H., October 21, 1942—99563/665.

"Immigration & Naturalization Service,
"Philadelphia, Pa.

"ATWAR Ivan Mrvica . . . RESHIPPED.

. . .

"W. J. Zucker,
"Acting District Director
"New York District
"By
"J. A. CHRISTOPHERSON
"Inspector in Charge
"Law Division"

This telegram was confirmed as follows:

"The alien reshipped foreign October 6, 1942, ex MS Dubravka, from San Pedro, California. Original warrant of deportation, appropriately executed, is attached."

In light of this record of what actually occurred, there is no support for the Court's conclusion that: "There is nothing in the order of deportation, in the endorsement of its 'execution,' or in any of the subsequent proceedings to indicate that the deportation order was not what it purported to be." *Ante*, at 567. On the contrary, the record clearly shows that petitioner was not actually deported to Yugoslavia in accordance with the terms of the warrant. Equally untenable is the Government's argument that by taking the single brief round-trip voyage to South America petitioner terminated his continuous residence in the United States: "because the vessel he boarded flew the Yugoslav flag . . . it may be said that petitioner at once resumed his former Yugoslav resi-

dence. . . . His actual dwelling place in fact was his ship."

The definition of residence in the Immigration and Nationality Act refutes the view that by his "physical presence" on the ship petitioner abandoned his American residence.[2] The statute, § 101 (a)(33) of the Immigration and Nationality Act of 1952, states that the "term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact . . . ." There can be no doubt that in fact petitioner's dwelling place was not the ship; his "place of general abode" was on shore in the United States where it has been continuously since January 1940. Ever since he entered and overstayed his leave in January 1940, petitioner has sought by all available means to remain in the United States. His single aim from which he has never deviated has been to regularize his status in the country.[3] The Court's view that petitioner by shipping to South America departed the United States is a legal conclusion—under the circum-

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[2] Section 101 (a)(33) provides that:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 1482 and 1484 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." 66 Stat. 170, 8 U. S. C. § 1101 (a)(33).

[3] Petitioner never concealed himself from the authorities, either before or after his voyage in 1942. On the contrary, he registered both as an alien and for selective service and was at all times willing, as he testified under oath at the immigration hearing, to "fight for the United States Government." He has a brother and other relatives in the United States; and his wife and children, to whom he regularly sends $200 a month in Yugoslavia, have an application pending for a visa to the United States and are awaiting regularization of his status to join him here.

stances here, a mere legal fiction. It must be remembered that the voyage which is said to have terminated petitioner's residence was a wartime voyage on a privately owned ship which, although flying a Yugoslav flag, was then part of the allied merchant marine under the effective control of the United States.

Of course where an alien is subject to a warrant of deportation and with the permission of the Government knowingly and voluntarily leaves the country in order to avoid the consequences of enforced deportation, he will be deemed to have "left the United States," within the meaning of the statute applicable at the time of petitioner's voyage. 8 U. S. C. (1940 ed.) § 180 (b). This statute, however, like all the provisions of the Immigration Law, "cannot be 'mechanically applied,'" *Costello* v. *Immigration and Naturalization Service*, 376 U. S. 120, 130, to a situation where, as here, the facts negate voluntary departure.

There is nothing in the record of this case to show that petitioner was advised or notified that he was being deported when he shipped on the Yugoslav vessel. To the contrary the record shows, in the language of an immigration officer, that petitioner "reshipped." Nor can it be said that he did so "voluntarily." The Government frankly states, what is commonly known, that there was a shortage of merchant seamen during the war, and that all available means were used to insure that foreign seamen stranded in this country would "ship foreign," *i. e.*, on allied merchant ships. I imply no criticism of the Government's efforts to man needed ships under the exigencies of war. I do maintain, however, that the circumstances negate the claim that petitioner "voluntarily" departed or left the United States when he "reshipped."

The petitioner and the Government both knew when he sailed, moreover, that because of the prevailing war-

time conditions and the limited itinerary of the voyage, he would shortly return and would be readmitted to the United States. Indeed in the warrant itself, petitioner was given express permission, notwithstanding the alleged deportation, to receive shore leave on returning.[4] Under these circumstances, it is my view that petitioner in fact never gave up his residence in the United States.[5] Since he never abandoned his residence in fact, he cannot, under the express terms of § 101, be deemed to have given it up "as a matter of law." For under this section residence is one's "actual dwelling place in fact" to be determined not by petitioner's physical presence on a ship for a short voyage nor by the Government's "intent" to terminate his residence here—an intent "executed" merely by marking a warrant calling for petitioner's deportation to Yugoslavia "reshipped SS Dubravka."[6] Since petitioner, in my view, remained a resident of the United States under § 101 notwithstanding his brief voyage, it follows that he has met the continuous residence requirement of § 249 and is entitled to registry.

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[4] The Government correctly argues that such permission did not constitute "an invitation" to return. This fact does, however, confirm what is clear from the surrounding circumstances, that the Government was fully aware that he would be returning to the United States.

[5] While on the ship, petitioner maintained all his ties in the United States, including his bank account and his union membership.

[6] In support of its contention that "a seaman can have his residence aboard a ship," the Government cites a number of statutes, such as the Act of May 9, 1918, 40 Stat. 542, giving residence credit to a seaman who serves for "three years on board of merchant or fishing vessels of the United States . . . ." No one questions the power of Congress to grant such credit. The Government points to no statutes or cases, however, which indicate that a single limited round trip voyage by a seaman converts the ship into "his principal, actual dwelling place in fact."

In *Costello* v. *Immigration and Naturalization Service*, 376 U. S., at 130, decided less than two months ago, this Court said that "in the absence of specific legislative history to the contrary, we are unwilling to attribute to Congress a purpose to extend this fiction [the relation-back concept] to the deportation provisions . . . ." We should similarly be unwilling to attribute to Congress a purpose to deport an alien of good moral character who has been a long-time resident of this country and who is otherwise eligible for the relief afforded by § 249 of the Act, by the fiction that he deported himself by shipping, with Government encouragement, as a seaman on a two-and-a-half-month round-trip voyage to South America during the war. In *Rosenberg* v. *Fleuti*, 374 U. S. 449, we refused to construe "entry" so mechanically as to impute to Congress the intent "to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in 'about a couple of hours.'" *Id.*, at 461. Here, too, we should refuse to define departure so mechanically as to impute to Congress the intent, contrary to the humane purpose of § 249, to permit the deportation of an alien resident in this country almost a quarter of a century.

UNGAR *v.* SARAFITE, JUDGE OF THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 167. Argued February 24, 1964.—Decided March 30, 1964.

An important prosecution witness in a state criminal trial was adjudged guilty of criminal contempt for his conduct as a witness in a post-trial hearing presided over by the judge before whom the contempt occurred at trial. A request for a continuance was denied, and the witness, himself an attorney, did not defend, arguing only that a continuance and a hearing before another judge should be afforded. The judge found the witness' exclamation at trial that he was being "coerced and intimidated and badgered" and that "[t]he Court is suppressing the evidence" to be disruptive contempt of court and sentenced the witness to 10 days' imprisonment and a fine. *Held:*

1. Criticism of the court's rulings and failure to obey court orders do not on the facts of this case constitute a personal attack on the trial judge so productive of bias as to require his disqualification in post-trial contempt proceedings. Pp. 583–585.

2. The court's characterization of the witness' conduct during the trial as contemptuous, disorderly and malingering was not a constitutionally disqualifying prejudgment of guilt, but at most was a declaration of a charge against the witness; nor can judicial bias be inferred from anything else in this record, particularly where nonsummary proceedings were held, dispassionately and decorously, after due notice and opportunity for hearing. Pp. 586–588.

3. The question of a continuance is traditionally within the trial judge's discretion, and not every denial of a request for more time violates due process, even if the party thereafter offers no evidence or defends without counsel; whether a denial of a continuance is so arbitrary as to violate due process depends on the facts of each case—here there was no constitutionally inadequate time to hire counsel and prepare a defense. Pp. 588–591.

12 N. Y. 2d 1013, 1104, 189 N. E. 2d 629, 190 N. E. 2d 539, appeal dismissed, certiorari granted, affirmed.

Osmond K. Fraenkel and *Emanuel Redfield* argued the cause for appellant. *Mr. Redfield* also filed briefs for appellant.

H. Richard Uviller argued the cause for appellee. With him on the brief was *Frank S. Hogan.*

Osmond K. Fraenkel filed a brief for the New York Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The appellant, Ungar, was adjudged guilty of criminal contempt for his conduct as a witness in a state criminal trial in a hearing presided over by the judge before whom the contempt occurred at trial. The New York Court of Appeals affirmed the conviction, 12 N. Y. 2d 1013, 1104, 189 N. E. 2d 629, 190 N. E. 2d 539, and we noted probable jurisdiction to consider whether the procedures seemingly authorized by §§ 750 and 751 of the New York Judiciary Law were consistent with the Due Process Clause of the Fourteenth Amendment. 375 U. S. 809. We have decided that the constitutional objections which this record shows to have been seasonably tendered to the New York courts and decided by them are without merit.

I.

The contempt proceeding grew out of the trial of Hulan Jack for conspiracy to obstruct justice and for violation of New York's conflict of interests laws. Ungar, a lawyer, was an important prosecution witness, familiar with the matters on which the charges were based and immune from prosecution for his testimony on these matters before the grand jury. From the outset of the second Jack trial, Ungar, a hostile prosecution witness, engaged in much wrangling with the prosecutor over the form of the questions asked and was unresponsive to various questions. Although counsel for the defendant did not object, the witness believed that the prosecutor's ques-

tions presented the defendant's case in a bad light or failed to elicit the whole truth.[1] On several occasions the trial judge instructed the witness to answer the questions as they were asked, if he could, but not to rephrase the questions or to offer testimony gratuitously.[2]

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[1] In explaining his conduct at trial, Ungar stated in his petition to the New York Supreme Court, Appellate Division:

"On the basis of facts known to petitioner, it is petitioner's belief and opinion that Hulan E. Jack is absolutely innocent of each and every of the crimes charged against him, including those of which he was found guilty at the second Jack trial. Petitioner believes that in truth and in fact evidence available to the District Attorney of New York County, which would have created a reasonable doubt as to Mr. Jack's guilt or innocence, was deliberately and wilfully suppressed, as will appear more fully hereinafter. One of the grounds of petitioner's conviction for criminal contempt is petitioner's statement to the foregoing effect during a moment of great emotional stress and physical and mental exhaustion at the second trial of Hulan E. Jack on November 25, 1960."

[2] The following incidents are typical:

"Q. You had discussions?

"A. A preliminary discussion with Mr. Gale. If you want me to tell you what he said I will be glad to.

"Q. Mr. Ungar, just confine your answers to my questions.

"A. I am sorry.

"Q. You discussed this matter of the lease with Mr. Gale and with Mr. Cymrot, is that correct?

"A. No. I can't accept the way you put that question. I discussed—

"The Court: No.

"The Witness: No, I can't accept that.

"The Court: It is not a question of whether you accept it, it is a question of whether you can answer it.

"The Witness: I can't answer that question that way.

"The Court: Next question.

"Q. The point is, you did discuss the matter of the lease with Mr. Cymrot and Mr. Gale, am I correct?

"A. I don't know how to answer that question the way you frame it because—

"The Court: That is enough. Next question, Mr. Scotti. Did you talk to these people? [*Footnote 2 continued on pp. 578–579*]

When Ungar failed to heed these instructions, the judge admonished him in chambers "to confine his answers to the questions" and to leave the defense to the accused's counsel; he warned the witness that he would hold him to the natural consequences of his acts. The pattern,

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"The Witness: Yes.
"The Court: Did they talk to you?
"The Witness: Yes.
"The Court: About the lease, the terms of the lease?
"The Witness: No.
"The Court: Next question.
. . . . . .

"Q. Let me put this question to you, then: Did there come a time while you were discussing with the owners of 299 Broadway—I withdraw the question. When the lease, the proposed lease had been submitted by the Bureau of Real Estate to the Board of Estimate for their consideration, and before the scheduled date for a hearing before the Board of Estimate, which was October 24, 1957, is that when you discussed this matter of the proposed lease with the defendant, Mr. Jack? . . .

"A. I can say only at this time I do not remember. I can only remember what you refreshed my recollection about, as to the testimony I gave in the Grand Jury on this subject.

"Q. You say that when you are mindful of the fact that I had refreshed your memory with respect to this matter?

"A. No, I am mindful of the fact that you read to me certain testimony that I had given before the Grand Jury on this matter, but I cannot recall the conversations. I didn't recall it the last time and I do not recall them now, but I will adopt what you said in the Grand Jury if I said it there.

"Mr. Baker thereupon requested a conference at the bench. Counsel for both sides had a discussion with the judge at the bench out of the hearing of the jury, after which the following took place on the record in open court in the presence of the jury:

"The Court: Now, Mr. Witness, the subject matter discussed at the bench with the Court related to your volunteering about the Grand Jury, concerning which you were not asked anything, and it created a problem here which the lawyers discussed, which Mr. Baker raised with the Court. There would have been no such problem if you had not referred to Grand Jury testimony.

however, continued. On November 25, the third day Ungar was on the stand, the court instructed him to give a responsive answer to a question of apparent significance to the State's case. Thereupon Ungar, before answering, requested a recess, claiming that he was being "pressured and coerced and intimidated into testifying" and that he

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"Now, may I please ask you when you are asked a question, just answer yes or no, please. Don't volunteer anything.

"Proceed.

. . . . . .

"Q. This is your recollection of your previous testimony?

"A. Yes.

"Q. Now, you did testify that you probably mentioned casually to him that you were buying this property and that the city was the lessee, and do you recall saying this at the last trial—

"Q. 'I can't tell you in substance because I have no independent recollection of any conversation. I probably mentioned casually to him that I was buying this property, and that the city is the lessee, and I think I said that half a dozen times too.'

"Q. Was that correct?

"A. Just a minute. I don't know what you mean by the last part of what you are reading. I probably said in my testimony half a dozen times, not that I spoke to him, the defendant, a half a dozen times.

"The Court: Mr. Witness, try not to do that, please. Just listen to the question. The questioner is asking you, 'Did you testify as follows at the last trial?' Try to confine your answer to that question.

"The Witness: May I look at the testimony?

. . . . . .

"A. No, I don't have the figures in front of me at this point.

"I would like to explain the matter, which I think could simplify it very quickly.

"The Court: No, no, no, Mr. Ungar. Please don't volunteer statements like that.

"As I indicated to you before, we have lawyers who conduct litigation. They have a right to phrase questions. It is not for you to volunteer anything. If you want to explain, or if the question is not satisfactory to you, that's none of your business.

"Now, please, keep that in mind, will you."

was being "badgered by the Court and by the District Attorney." When the court granted a short recess but refused Ungar permission to leave the stand, the following ensued:

> "The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.
>
> "The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.
>
> "The Witness: I would like to leave the stand, your Honor.
>
> "The Court: No, you may not leave the stand.
>
> "The Court: Proceed, Mr. Scotti.
>
> "The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.
>
> "The Court: You are not only contemptuous but disorderly and insolent." [3]

The judge called a recess, during which counsel for the defendant requested the court to appoint a doctor to determine whether Ungar was malingering or incapable of testifying. Upon resumption, Ungar represented that

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[3] Section 750, Judiciary Law of New York, defines criminal contempt as:

"1. Disorderly, contemptuous, or insolent behavior, committed during [the court's] sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. . . ."

he obtained his own medical assistance, the court agreed with Ungar that he was competent to testify, and denied the request. Ungar testified for another day without further incident.

The Jack trial ended on December 6, 1960, and during the afternoon of December 8, 1960, Judge Sarafite, the trial judge, pursuant to the New York procedure governing nonsummary trial of contempts, had served on Ungar a show-cause order charging that Ungar's remarks from the stand on November 25 constituted a willful and disruptive contempt of court and ordering that the appellant appear on December 13 at 10 a. m. to defend against the charges. Judge Sarafite, presiding at the hearing, denied several motions for a continuance, and Ungar's retained counsel was permitted to withdraw upon informing the court that he had agreed to undertake the defense only if Ungar could obtain a continuance. After exhibits material to the charges were admitted into evidence, Ungar was asked to defend. He declined, arguing that a continuance and a hearing before another judge should be granted. The court found Ungar guilty of contempt and, taking into consideration Ungar's emotional state from the stress of the Jack trial, sentenced him to 10 days' imprisonment and imposed a fine.

The Appellate Division of the New York Supreme Court dismissed the appeal, the state procedure for review of nonsummary contempt proceedings, and denied the petition under Article 78, Civil Practice Act, the procedure for review of summary contempt convictions,[4]

[4] *Douglas* v. *Adel*, 269 N. Y. 144, 199 N. E. 35; *Negus* v. *Dwyer*, 90 N. Y. 402; *Pugh* v. *Winter*, 253 App. Div. 295, 2 N. Y. S. 2d 9; *Brewer* v. *Platzek*, 133 App. Div. 25, 117 N. Y. S. 852.

Decisions of the New York courts make clear that a contempt committed in the presence of the court may be punished by the nonsummary procedure applicable to other contempts of court. *Goodman* v. *Sala*, 268 App. Div. 826, 49 N. Y. S. 2d 245; *Choate* v. *Barrett*, 56 Hun 351, 9 N. Y. S. 321, aff'd, 121 N. Y. 678, 24 N. E. 1095.

both without opinion. 16 App. Div. 2d 617. The New York Court of Appeals affirmed, also without opinion. 12 N. Y. 2d 1013, 189 N. E. 2d 629. It denied the appellant's motion for reargument, the only part of the record before this Court in which appellant's federal constitutional claims were asserted, and granted in part appellant's motion to amend the remittitur to show that certain constitutional questions were passed upon in the appeal. Treating both the appeal and the Article 78 proceeding identically, the Court of Appeals ruled in the amended remittitur that rights under the Fourteenth Amendment had been raised and passed upon and stated that "appellant argued that such rights were violated by (1) the trial judge's refusal to grant an adjournment of the contempt proceeding upon proof of the engagement of his counsel; (2) the trial judge's invoking of summary power under § 751 of the Judiciary Law seven days after the end of the trial during which the contempt was committed, and (3) the same trial judge's presiding in the resulting contempt proceeding even though he was the judge 'personally attacked.'" In response to the third contention, the court ruled that the appellant's remarks were not a personal attack upon the judge. 12 N. Y. 2d 1104, 190 N. E. 2d 539.

II.

We have determined that the appeal must be dismissed for want of jurisdiction. The Jurisdictional Statement contains a statutory attack on the validity of § 750, Judiciary Law, as unduly vague, and on § 751 as authorizing a judge who is personally attacked to preside over a contempt hearing and as authorizing summary proceedings after the trial in which the contempt occurs. Nothing in the record shows that these issues were tendered to the Appellate Division or the Court of Appeals prior to the motion for reargument or to amend the remittitur. Only the latter was granted and then only in part. Therefore

the amended remittitur is determinative in this Court on the constitutional issues raised and necessarily passed upon in the state courts. *Bailey* v. *Anderson,* 326 U. S. 203. That remittitur speaks of rights asserted and passed upon under the Fourteenth Amendment and does not indicate that a state statute was "drawn in question" and sustained over constitutional objections. See *Mergenthaler Linotype Co.* v. *Davis,* 251 U. S. 256, 259; *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185–186. The appeal is accordingly dismissed.[5] Treating the appeal as a petition for certiorari, certiorari is granted, 28 U. S. C. § 2103, *Anonymous* v. *Baker,* 360 U. S. 287, limited, however, to the three constitutional issues which the amended remittitur states petitioner had argued and which, we assume, were the constitutional questions the New York Court of Appeals passed upon.

III.

Petitioner, Ungar, claims his constitutional rights to a fair hearing were violated because his contemptuous remarks were a personal attack on the judge which necessarily, and without more, biased the judge and disqualified him from presiding at the post-trial contempt hearing. The New York Court of Appeals rejected the claim and we see no error in this conclusion. Assuming that there are criticisms of judicial conduct which are so personal and so probably productive of bias that the judge must disqualify himself to avoid being the judge in his own case, we agree with the New York court that this is not such a case.

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[5] Appellant concedes that the vagueness objection to the state statute was not explicitly argued to the Court of Appeals. The trial judge did not purport to invoke summary power under § 751, Judiciary Law, and the Court of Appeals expressly declined to construe § 751 to authorize a trial judge personally attacked to preside at the contempt proceedings.

It is true that Ungar objected strongly to the orders of the court and to its conduct of the trial during his examination. His final outburst, the subject of the contempt, was a flat refusal to answer, when directed by the court, together with an intemperate and strongly worded comment on the propriety of the court's ruling. But we are unwilling to bottom a constitutional rule of disqualification solely upon such disobedience to court orders and criticism of its rulings during the course of a trial. See *Nilva* v. *United States*, 352 U. S. 385.[6] We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions. Apparently because Ungar was being required to answer the questions asked rather than some others which he would rather have answered and because he was directed to cease volunteering testimony, Ungar claimed he was being "badgered" and "coerced" and that the court was "suppressing the evidence." This was disruptive, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.

Nor is there anything else of substance in this record which shows any deprivation of petitioner's right to be tried by an unbiased and impartial judge without a direct personal interest in the outcome of the hearing. *Tumey* v. *Ohio*, 273 U. S. 510. *In re Murchison*, 349 U. S. 133.

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[6] See also Fed. Rules Crim. Proc. 42 (b): "Disposition Upon Notice and Hearing. A criminal contempt [except one subject to summary disposition] . . . shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. . . . If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

The Court in the latter case held that a judge acting as a one-man grand jury investigating crime could not convict for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings and is not controlling here. For both *In re Oliver*, 333 U. S. 257, and *Murchison* make abundantly clear that the Court was not dealing therein with the traditional category of contempts committed in open court, which cannot be likened to the so-called contempts committed in *in camera* grand jury proceedings, especially when the latter are founded upon perjury charges.

Unlike *Cooke* v. *United States*, 267 U. S. 517, and *Offutt* v. *United States*, 348 U. S. 11, which were contempt cases from lower federal courts in which the Court found personal bias sufficient to disqualify the judge from convicting for contempt, this record does not leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner. Whatever disagreement there was between petitioner and the judge stemmed from the petitioner's resistance to the authority of the judge and its exercise during the trial. Petitioner was strongly admonished that his conduct was disruptive and disorderly and that he would be held to the natural consequences of his acts. But requiring petitioner to answer the questions put to him and to cease caviling with the prosecutor was fully in accord with the judicial obligation to maintain the orderly administration of justice and to protect the rights of the defendant on trial. Neither in the courtroom nor in the privacy of chambers did the judge become embroiled in intemperate wrangling with petitioner.[7] The judge dealt firmly with Ungar, but

[7] The following excerpt from the discussion in the judge's chamber following persistent resistance to instructions to answer questions is probably the most intense disagreement between petitioner and the judge that occurred during the trial.

"The Court: Now, Mr. Witness, this case was tried once before and took considerable time. You were a witness for many days. A

without animosity, and petitioner's final intemperate outburst provoked no emotional reflex in the judge. See *Fisher* v. *Pace*, 336 U. S. 155. The characterization of the petitioner's conduct as contemptuous, disorderly, and

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number of incidents occurred in that trial which, in my judgment, directly tended to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court, and you were the one who created those incidents, in my judgment.

"I told you then, at the first trial, that you were creating a very serious problem for the Court and that, as a lawyer, I assumed you knew what the problem was.

"I should like very much to avoid any repetition of what happened the last time.

"We each have a function to perform here. Whether it is an agreeable function or a disagreeable function is of no concern.

"Now I have said to you up to now on a number of occasions that you should confine your answers to the questions, not to volunteer, not to get into any dispute or discussions, not to try to indicate what you think the question should be or how you should answer it.

"This is a trial before the jury, not before the Court alone. As a judge, I must rule in accordance with my understanding of the law, which I am doing.

"I hope you understand what I am saying, Mr. Ungar. Do you?

"The Witness: Well, I would like to say a word, if I may.

"The Court: No.

"The Witness: I can't understand what your Honor is saying.

"The Court: Then if you can't understand—

"The Witness: I understand what your Honor is saying—

"The Court: I don't want anything further, Mr. Ungar. All I want to add to what I have said, since you said you do not understand what I am saying—

"The Witness: I understand what your Honor is saying.

"The Court: You said you didn't.

"The Witness: But I cannot understand it in a vacuum; that's what I am trying to say, your Honor.

"The Court: Don't argue with me, Mr. Ungar.

"The Witness: I have got to understand the question, in order to answer it. I can't answer a question merely if your Honor says, 'Answer it,' if it doesn't make sense to me or if it's creating a false impression— [*Footnote 7 continued on pp. 587–588*]

malingering was at most a declaration of a charge against the petitioner, based on the judge's observations, which, without more, was not a constitutionally disqualifying prejudgment of guilt, just as issuance of a show-cause

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"The Court: Will you desist. You see, it's none of your business whether it creates in your judgment a false impression or not. The defendant is represented here by a lawyer, and the People are represented by a lawyer. It is for them to conduct this litigation, and not you.

"Now I am only going to make one more statement and we will return to the courtroom.

"There is a rule of law that every man is presumed to intend the natural consequences of his act. I am going to hold you to that standard. And whether you tell me that you understand what I said or not will not be the test that I shall use in whatever action I propose to take."

"Not only should you, as a man and a citizen, be held to intend the natural consequences of your act, but you as a lawyer should be held to a higher standard of knowing that you are responsible for the natural consequences of your act.

"Also, there is a rule that every citizen is presumed to know the law. I take it that every citizen does not know the rules of the law of evidence. But as a lawyer, you certainly know the rules of law of evidence.

"Let's return to the courtroom.

"The Witness: I think I have a right, if your Honor please—

"The Court: I shall not—

"The Witness: —to have a statement made.

"Your Honor has made a statement which is intimidating. Your Honor has made a statement which is coercive, and I think I have a right to make a statement.

"Now if your Honor intends to take action against me, I submit that the action should be taken here and now. But I insist upon a right, and think that I am justified as a witness to make a statement before your Honor takes any action.

"I have a right to understand any question that's propounded to me, and I have a right, if a question is framed in such a way which creates a reflection upon me and which is not a fact—I have a right—

"The Court: Keep your voice down, Mr. Ungar. I kept my voice down.

order in any criminal contempt case, based on information brought to the attention of a judge, is not such a prejudgment of guilt. Moreover, Judge Sarafite, although believing that Ungar's conduct was disruptive of the trial, did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding. In these circumstances, we cannot say there was bias, or such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.

IV.

Petitioner's additional attack upon the hearing afforded him centers upon the denial of his motion for a continu-

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"The Witness: I'm sorry, I apologize.

"The Court: And stop doing that. Don't raise your voice. And you have said enough. I have your point.

"Now the Court is not intimidating you. It is not coercing you, and it is not threatening you.

"The Witness: I disagree with your Honor.

"The Court: I didn't ask you whether you disagreed.

"And I suggest to you, Mr. Ungar, that you speak when you are asked to speak, from now on—please.

"Now the purpose of calling you in here was not to intimidate you or coerce you in the slightest. But the purpose is to avoid a repetition in the courtroom of the unseemly performance of the last trial, which I shall not tolerate.

"Now let's return to the courtroom.

"The Witness: I believe I have tried—

"The Court: I told you to speak when you were asked to speak.

"The Witness: Have I a right—

"The Court: No.

"The Witness: Have I a right to understand questions?

"The Court: Let's return to the Courtroom.

"The Witness: I am asking the Court if I have a right to ask the question—"

ance which is said to have deprived him of his constitutional right to engage counsel and to defend against the charge. The State, among other arguments, denies Ungar's right to any hearing at all, relying upon *Sacher* v. *United States,* 343 U. S. 1, as permitting the judge summarily to convict for contempt at the conclusion of trial. We do not and need not, however, deal with the circumstances in which a trial judge may or may not constitutionally resort to summary proceedings after trial. For in this instance, assuming a nonsummary hearing was required,[8] the hearing afforded petitioner satisfied the requirements of due process.[9] *In re Oliver,* 333 U. S. 257; *In re Green,* 369 U. S. 689.

The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery* v. *Alabama,* 308 U. S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler* v. *Fretag,* 348 U. S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva* v. *United States,* 352 U. S. 385; *Torres* v. *United States,* 270 F. 2d 252

[8] This disposes of petitioner's second argument set out in the amended remittitur of the Court of Appeals that the invocation of summary power seven days after the end of the trial during which the contempt was committed denied due process.

[9] These requirements include the right to be adequately advised of charges, a reasonable opportunity to meet the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses.

(C. A. 9th Cir.); cf. *United States* v. *Arlen*, 252 F. 2d 491 (C. A. 2d Cir.).

Ungar was served with a show-cause order on Thursday at about 5 p. m.,[10] the hearing being scheduled for the following Tuesday at 10 a. m. Ungar appeared with counsel at the appointed time. Two short continuances were then granted to allow another lawyer to appear for Ungar. When the latter arrived, the case was again called and counsel requested a one-week delay, informing the court that he was unfamiliar with the case because he had not been contacted until Saturday and because he was then busily engaged in trying another case. The court denied the motion for adjournment, being of the view that Ungar had been afforded sufficient time to hire counsel who would be available at the time of the scheduled hearing. We cannot say that this decision, in light of all the circumstances, denied petitioner due process. The five days' notice given petitioner was not a constitutionally inadequate time to hire counsel and prepare a defense to a case in which the evidence was fresh, the witnesses and the evidence readily available, the issues limited and clear-cut and the charge revolving about one statement made by Ungar during a recently completed trial. Furthermore, the motion for continuance was not made until the day of the scheduled hearing and Ungar himself was a lawyer familiar with the court's practice of not granting adjournments.

After denial of the motion, counsel was permitted to withdraw and the hearing proceeded. Ungar himself then argued for a continuance on the same ground as his counsel and on the additional ground that a few hours were needed to enable him to present medical proof and expert testimony showing no contempt was intended.

[10] Ungar was also told after his outburst on November 25 "to keep himself available" for further proceedings.

He also referred to a snowstorm on the previous Sunday and Monday which allegedly had prevented any preparation with counsel. The motion was again denied and again we can find no denial of due process. Ungar asserted no reason why the testimony and medical proof, which he conceded were readily available and producible within hours, was not obtained between Thursday and Tuesday and presented in court at the time of the scheduled hearing, nor did he name the witnesses he would call nor did he give the substance of their testimony. The trial judge could reasonably have concluded that petitioner's reliance upon inclement weather was less than candid since Ungar's counsel's previous statement that he could not represent Ungar without an adjournment was grounded upon his engagement in another trial. These matters are, of course, arguable, and other judges in other courts might well grant a continuance in these circumstances. But the fact that something is arguable does not make it unconstitutional. Given the deference necessarily due a state trial judge in regard to the denial or granting of continuances, we cannot say these denials denied Ungar due process of law.

The judgments are

Affirmed.

MR. JUSTICE HARLAN, concurring.

I agree with and join the opinion of the Court, but wish to add that the contempt procedure employed by Judge Sarafite accorded Ungar more than his due under *Sacher* v. *United States,* 343 U. S. 1. In light of that case it is clear that Judge Sarafite, so far as the Federal Constitution is concerned, could have proceeded at the close of the main trial to hold Ungar in contempt without any hearing at all. The fact that the contempt adjudication followed a five-day notice given Ungar two days

after the close of the trial cannot, as a constitutional matter, well be deemed to have extinguished the judge's power to proceed summarily.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE GOLDBERG concur, dissenting.

This case is a classic example of one situation where the judge who cites a person for contempt should not preside over the contempt trial.[1] That was the result in *Offutt* v. *United States*, 348 U. S. 11, 17, where the judge became "personally embroiled" with the person he later held in contempt; and we, pursuant to our supervisory authority over the federal system, ordered a new trial before a disinterested judge. The same result is required under due process standards. *In re Murchison*, 349 U. S. 133.

I start with what Chief Justice Taft wrote in *Cooke* v. *United States*, 267 U. S. 517, 539:

> "This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases,

[1] This is not a case of summary contempt during the course of a trial, where "immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U. S. 257, 275.

> however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place."

There is in our annals a no more apt case for following that course than the present one. Here the judge who cited petitioner for contempt did become "personally embroiled" with him and, in substance, adjudged him a malingerer and found him guilty before the trial—indeed before the citation.

Petitioner, a witness in a criminal trial in a New York court, was found guilty of contempt of court by the judge who presided at the trial, the contempt being tried after the main trial had ended.[2] He was fined $250 and sentenced to 10 days in jail. The conviction was sustained by the Court of Appeals without an opinion. That court, however, said in its remittitur:

> ". . . we point out that where the alleged contempt consists *of the making of charges of wrongdoing by the trial judge himself* he should, where disposition of the contempt charge can be withheld until after the trial and where it is otherwise practicable, order the contempt proceeding to be tried before a different judge." (Italics added.)

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[2] Unlike *Sacher* v. *United States*, 343 U. S. 1, where the trial judge at the end of the trial summarily found counsel participating in the trial guilty of contempt, the judge in the instant case, following the procedure recommended by *Cooke* v. *United States*, 267 U. S. 517, issued a rule to show cause why the witness should not be held in contempt and held a hearing on that citation.

It was because the Court of Appeals thought that this contempt did not involve "the making of charges of wrongdoing by the trial judge himself" that it upheld trial of this contempt charge by the offended judge. But this contempt charge, as I read it, did charge such wrongdoing:

> "On said November 25, 1960, the respondent, as a witness in said trial committed a wilful contempt of court during the sitting of the Court, and in its immediate view and presence, in that he wilfully and in a repeated effort, obvious to the Court, to disrupt the orderly trial of the case therein, culminated his contemptuous conduct by shouting in a loud, angry, disorderly, contemptuous, and insolent tone directly tending to interrupt the proceedings of the Court and to impair the respect due to the authority of the Court:
>
> "'*I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.*'" (Italics added.)

The charge that the trial judge was "suppressing the evidence" certainly was a charge of "wrongdoing," in the sense of malfeasance. The witness did indeed complain of the trial judge's "attitude and conduct" toward him. When he said "I am being coerced and intimidated and badgered," he meant in the setting of those words not that the prosecutor alone was misconducting himself but that the judge was also. Any doubt is dispelled by his final statement, "The Court is suppressing the evidence." It is obvious that whatever else may be said of the alleged contempt it was aimed at the judge and implicated him and the judicial proprieties.

The episode was a head-on collision between the judge and a witness who said he could not understand the

questions asked him and therefore could not truthfully answer. It was a head-on collision between a witness who complained he was unfit to testify and a judge who said his physical condition was faked:

"The Witness: If your Honor please, I want to recess at this point. I can't testify. I am too upset, and I am much too nervous. And I can't testify under these circumstances. I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and I can't testify under these circumstances.

. . . . . .

"The Court: We shall pause for a minute or two, Mr. Witness.

"(Whereupon, there was a brief interval of silence in the courtroom.)

"The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.

"I ask for the privilege of leaving the stand, your Honor.

"The Court: No, you will remain on the stand.

"The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.

"The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.

"The Witness: I would like to leave the stand, your Honor.

"The Court: No, you may not leave the stand.

"(Whereupon, there was a further brief interval of silence in the courtroom.)

"The Court: Proceed, Mr. Scotti.

"The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.

"The Court: *You are not only contemptuous but disorderly and insolent.* [Italics added.]

"The Witness: I have asked for the privilege of leaving the stand for five minutes.

"The Court: Put your question, Mr. Scotti.

. . . . .

"Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?

"A. I can't answer any questions. I am not even concentrating on what you are saying. I can't even think clearly at this minute any more.

"The Court: Do you refuse to answer?

"The Witness: I don't know what he is talking about, Judge. I am an emotional wreck at this time. I am asking for a recess. I ask the right to get off this stand so that I can contain myself.

"The Court: Do you refuse to answer the question, Mr. Ungar?

"The Witness: I said I can't answer the question, your Honor.

"The Court: Put the question, Mr. Reporter.

"Mr. Scotti: Mr. Reporter, read the question.

"(The question was read by the Court Stenographer as follows:

" 'Q. Mr. Ungar, did you tell Mr. Jack that Saturday morning that there was a conflict between your story to me and Mr. Bechtel's story to me?')

"The Court: Let the record show that the defendant has remained silent and has not answered the question for four minutes.

"Mr. Scotti: You mean the witness, your Honor.

"The Court: What did I say?

"Mr. Scotti: The defendant.

"The Court: Obviously I meant the witness. Very well, we will advance our luncheon recess.

"Do not discuss the case, ladies and gentlemen, do not form or express any opinion as to the guilt or innocence of this defendant until the case is finally submitted to you. Since we are advancing the hour when we start our luncheon recess, we will get back here at 1:45. You may retire.

"(The jurors then left the Court room and the following took place in their absence:)

"Mr. Baker [counsel for defendant]: May I be heard before the Court leaves?

"The Court: Yes.

"Mr. Baker: There has been a statement made by the witness that he is emotionally or mentally incapable of testifying. So that the record would be crystal clear, I make a request of the Court to appoint a doctor to determine whether or not there is malingering on the part of the witness or anything of the sort.

"The Court: In my judgment, *this is as near as malingering could ever be determined from my observation.* [Italics added.]

"The Witness: I join in that request, if your Honor please.

"The Court: What is the ground of your application?

"Mr. Baker: The ground of my application is, if the Court please, the law presumes that when a witness testifies he is to be lucid. This witness says he is not. Any testimony he gives may be prejudicial to the rights and interests of the defendant. That's the ground of my objection, and so that the record would be clear, whether this is malingering or not, there is a mental and emotional condition presently existing in this witness so that he could not be a competent witness to testify, all of which may be to the detriment of the defendant.

"The Court: I shall reserve decision on your application and I shall direct the witness to remain in court until I decide it. The Court will take a recess until 1:45.

"(After a short recess the Court returned to the courtroom, Mr. Baker and the defendant being present, and the following took place:)

"The Court: Mr. Baker, I wanted to get both sides here. The reason I have asked Mr. Ungar to remain was because if I had made a decision, why, then, I could have acted on it. Since I haven't made a decision I see no point in having him remain here. He is entitled to take his luncheon recess the same as anybody else, but I didn't want to lose time if I could help it.

"Mr. Baker: I am glad the Court indicated the purpose of asking the witness to remain.

"The Court: That was the only purpose, because I said to you I reserve decision, and I thought I might be able to decide it and save time. Would it be a burden to give me another five minutes?

"Mr. Baker: No, your Honor.

"The Witness: Is your Honor addressing me?

"The Court: Yes.

"The Witness: No, it is not a burden, your Honor, because I was not malingering, and I have been shaking ever since this issue started.

"The Court: I just want five more minutes, and if I don't decide it by that time then we will all go to lunch.

"(A short recess was taken; the Court left the courtroom and returned.)

"The Court: Mr. Ungar, I haven't made up my mind what course of action I should take. I think you ought to take a recess until 1:45. Let us see what the situation is at that time.

. . . . .

"The Court: Now, Mr. Witness, before we took a luncheon recess you personally, as a witness, had asked for a recess. Do you recall that?

"The Witness: I do, your Honor.

"The Court: Now that we have had the luncheon recess and you have come back, do you still ask for a recess?

"The Witness: Well, I would like to report to the Court that I went to the hospital and received an injection, and I think that I can proceed temporarily, in addition to the pills that I have taken this morning.

"The Court: Very well.

"Mr. Scotti: May I proceed, your Honor?

"The Court: Yes."

When counsel for the defendant again asked for a ruling on the motion to have a doctor examine petitioner the Court said:

"I thought it was obvious to everyone that when the witness resumed the stand at 1:45 P. M. after the luncheon recess, and the Court asked the witness

whether his request for a recess while testifying on the stand, and before the announcement of the luncheon recess, still stood. The witness said he had been to a hospital to get a shot, and that he could.

"Mr. Scotti: That he could proceed temporarily.

"The Court: That he could proceed temporarily, and I thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed, and consequently made no formal declaration on the record.

"To avoid any possible question about that I now deny the motion."

A financial interest in the outcome of a case, as in *Tumey* v. *Ohio*, 273 U. S. 510, will, of course, disqualify a judge from sitting. As Chief Justice Taft said in that case:

> "The Mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal." *Id.*, at 531–532.

The bias here is not financial but emotional. *In re Murchison, supra,* involved a closely related question arising in a state case. There the judge who served as the "one-man grand jury" also had doubts about the way in which a witness testified before him. He charged him with contempt for refusing to answer. We reversed the conviction, saying,

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the

> very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings. A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." 349 U. S., at 137.

The present case is a stronger case for reversal than *In re Murchison*. There the bias of the judge was inferred. Here it is apparent on the face of the record. For when the witness said "The Court is suppressing the evidence," the judge replied, "*You are not only contemptuous but disorderly and insolent.*" (Italics added.) Moreover, while petitioner was still on the stand as a witness in the main case, the judge condemned him as a malingerer and refused to order a medical examination. Thus, long before the contempt trial—long before the contempt charge had been filed—the judge, who later sentenced the witness for contempt, had concluded—and stated in so many words—that the witness was "contemptuous." It is a travesty on American justice to allow a judge who has announced his decision on the issue of guilt prior to the trial to sit in judgment at the trial.

Judges are human; and judges caught up in an altercation with a witness do not have the objectivity to give that person a fair trial. In the present case, the *basic* issue was whether the witness was sick or whether he was faking. The judge, who found him guilty for an outburst

that might have been excused coming from the lips of a sick man, had announced his decision when the witness asked to be excused. He then said that the witness was a malingerer; and he refused to call a doctor.

This aspect of the case emphasizes a second reason why a different judge should have tried the contempt charge. The judge who accused the witness of malingering was not a medical expert and his conclusion that the witness was faking, though admissible as evidence, would not be conclusive. This crucial fact was one that the judge should not be left to decide on the basis that he saw the witness and therefore could be depended upon to determine that he was not ill, as, contrariwise, he could have been depended upon to know that the accused had openly resisted a marshal, as in *Ex parte Terry*, 128 U. S. 289.

A man going on trial before that judge is denied a basic constitutional right—the right to examine and cross-examine. As we said in *In re Murchison, supra*, if the emotionally involved trial judge tries the contempt "the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way." 349 U. S., at 139.

An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

I agree with my Brother DOUGLAS that due process of law requires that this contempt be tried before a different judge.

This Court has recognized that the power of a judge to impose punishment for criminal contempt without notice or hearing is:

> "capable of grave abuses, and for that reason [the Court has never given any] encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise." *In re Oliver*, 333 U. S. 257, 274.

The Court has also "marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.'" *Ibid.*, quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231.

I would hold, therefore, that the Constitution forbids a judge to impose punishment for such contempt without notice or hearing, except when (1) the contempt creates such "'an open threat to the orderly procedure of the court . . . [that if] not instantly suppressed and punished, demoralization of the court's authority will follow,'" *In re Oliver, supra*, at 275, quoting *Cooke* v. *United States*, 267 U. S. 517, 536, and when (2) "no explanation could mitigate [contemner's] offence or disprove the fact that he had committed such contempt of [the court's] authority and dignity as deserved instant punishment." *Ex parte Terry*, 128 U. S. 289, 310.

The power to punish in so summary a fashion is, as the New York Court of Appeals recognized, fraught with danger, particularly when the alleged contempt consists of a charge of wrongdoing against the very person sitting in judgment of the contempt.

MR. JUSTICE DOUGLAS has convincingly demonstrated that the contempt charged here was not such an open threat to the orderly procedure of the court as to necessitate instant punishment, that an explanation or the introduction of evidence could have mitigated or disproved the offense, and that it consisted essentially of a charge of wrongdoing against the very person sitting in judgment of the contempt.

I conclude, therefore, that this contempt could not constitutionally have been tried summarily,* and that it should have been tried before a different judge.

*There may well be instances of disruption where the trial judge correctly feels that *some* immediate action is necessary to restore order but that a full, immediate civil or criminal contempt proceeding might cause undue prejudice against the defendant in the main trial. In attempting to accommodate these conflicting demands, the trial judge should have some latitude, limited, of course, by the overriding principle of the law of contempts that the power exercised be "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *In re Oliver*, 333 U. S. 257, 274.

RABINOWITZ ET AL. *v.* KENNEDY, ATTORNEY GENERAL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 287. Argued March 2, 1964.—Decided March 30, 1964.

1. An attorney who performs legal services, including the handling of litigation, for a foreign government must register under the Foreign Agents Registration Act of 1938, as amended. The work of a lawyer in litigating for a foreign government cannot, within the meaning of the exemption section of the Act, be characterized as only "financial or mercantile" activity, for those terms are used in the Act to describe conduct of an ordinary private commercial character. Furthermore, since the interest of a foreign government in litigation, even if relating to financial or mercantile matters, cannot be deemed only "private and nonpolitical," an attorney engaged in such litigation cannot under any construction of the Act qualify within the exemption section. Pp. 609–610.
2. Where petitioners have made no attempt to determine which questions on the government registration form must be answered and where the Government admits that some of the questions are wholly or partially inapplicable, the issue as to the extent of the disclosure to be required of attorneys under the Foreign Agents Registration Act is not ripe for adjudication. Pp. 601–611.

115 U. S. App. D. C. 210, 318 F. 2d 181, affirmed on other grounds.

David Rein argued the cause and filed briefs for petitioners.

Stephen J. Pollak argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Doris H. Spangenburg.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioners, attorneys engaged in the general practice of law, instituted this declaratory judgment action, 28

U. S. C. § 2201, against respondent, the Attorney General of the United States, in the United States District Court for the District of Columbia. The complaint alleged that petitioners had been:

> "retained by the Government of the Republic of Cuba to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba. . . . The retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, nor have the plaintiffs advised, represented, or acted on behalf of the Republic of Cuba in any such matters."

The complaint alleged further that respondent had "demanded that [petitioners] . . . register with the Attorney General under the provisions of the Foreign Agents Registration Act of 1938, as amended." The relief sought by petitioners included a "judgment declaring that their activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended . . . ." 52 Stat. 631, as amended, 22 U. S. C. § 611.

That Act requires the registration of "any person who acts or agrees to act . . . as . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal . . . ." "Foreign principal" includes "a government of a foreign country and a foreign political party," as well as "a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country . . . ." The Act exempts from registration any "person engaging or agreeing to engage only

in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal . . . ."

Respondent moved for judgment on the pleadings. The District Court denied the motion, but at the request of respondent and with the consent of petitioner, the court certified to the Court of Appeals the "controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit . . . ."

The Court of Appeals for the District of Columbia, noting that petitioners did not challenge the constitutionality of the Foreign Agents Registration Act, held, with one judge dissenting, that the doctrine of sovereign immunity required that the case be dismissed "as an unconsented suit against the United States." 115 U. S. App. D. C. 210, 212, 318 F. 2d 181, 183. We granted certiorari, 375 U. S. 811.

We hold, for the reasons stated below, that the Foreign Agents Registration Act plainly and unquestionably requires petitioners to register. Since we conclude that the Court of Appeals was correct in ordering the case dismissed, but for reasons other than those relied upon in its opinion, we do not pass upon the reasoning by which that court arrived at its decision, nor do we have occasion to consider the scope of the declaratory judgment remedy or the sovereign immunity doctrine.[1]

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[1] See, *e. g.*, Borchard, Declaratory Judgments (2d ed., 1941); Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale L. J. 445 (1943); Davis, Sovereign Immunity in Suits Against Officers for Relief Other than Damages, 40 Cornell L. Q. 3 (1954); Davis, Suing the Government by Suing an Officer, 29 U. of Chi. L. Rev. 435 (1962); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

The Foreign Agents Registration Act was first enacted by Congress on June 8, 1938. It required agents of foreign principals to register with the Secretary of State. "[A]gent of a foreign principal" was defined as "any person who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, *or attorney* for a foreign principal . . . ." 52 Stat. 631, 632. (Emphasis added.) "Foreign principal" was defined as "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization . . . ." Exempted from the definition of "agent of a foreign principal" was "a person, other than a public-relations counsel, or publicity agent, performing *only private, non-political, financial, mercantile, or other activities* in furtherance of the bona fide trade or commerce of such foreign principal." 52 Stat. 631, 632. (Emphasis added.) In 1961, the exemption section was amended to apply to persons "engaging or agreeing to engage *only in private and non-political financial or mercantile activities* in furtherance of the bona fide trade or commerce of such foreign principal . . . ."[2] (Emphasis added.) 75 Stat. 784. The Senate and House Reports accompanying this amendment state its purpose as follows:

> "The so-called commercial exemption has proved to be ambiguous. During hearings held on H. R. 6817 in the 86th Congress, a bill identical to H. R. 470, a representative of the Department of Justice testified that the language contained in the exemption has led to confusion and unnecessarily difficult

[2] This section had previously been amended in 1942 to cover any person "engaging or agreeing to engage only in private, nonpolitical, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal . . . ." 56 Stat. 254.

> problems in the administration of the law. Argument has been made that if an agent of a foreign principal meets any one of the above-quoted conditions, as distinguished from meeting several or all of the requirements, it need not register. As rewritten, the section with its proposed changes and sentence structure makes it clear that for an agent to qualify for exemption from the obligation of registering, it must be engaged in activities which meet either of two sets of three requirements. *They must be private and nonpolitical and financial, or private and nonpolitical and mercantile. If any one of these characteristics is lacking, the agent cannot qualify for exemption and therefore must register under the act.*" (Emphasis added.) S. Rep. No. 1061, 87th Cong., 1st Sess., p. 2.

See also H. R. Rep. No. 246, 87th Cong., 1st Sess.

Petitioners here are attorneys who have been retained "to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation . . . ." As an example of their "activities" pursuant to this retainer, petitioners cite their appearance before this Court in the recently decided case of *Banco Nacional de Cuba* v. *Sabbatino, ante,* at 398.

Although the work of a lawyer in litigating for a foreign government might be regarded as "private and nonpolitical" activity, it cannot properly be characterized as only "financial or mercantile" activity. It is clear from the statute and its history that "financial or mercantile" activity was intended to describe conduct of the ordinary private commercial character usually associated with those terms. See, *e. g.*, S. Rep. No. 1783, 75th Cong., 3d Sess. Furthermore, although the interest of a government in litigation might be labeled "financial or mercantile," it cannot be deemed only "private and nonpoliti-

cal." Since an attorney may not qualify for exemption "[i]f any one of these characteristics is lacking," it would be impossible to conclude, under any construction of the statute, that petitioners are engaging "only in private and nonpolitical financial or mercantile activities."

We conclude, therefore, that petitioners, attorneys representing a foreign government in legal matters including litigation, are not exempt from registering under the Foreign Agents Registration Act.

In support of their case, petitioners also claim that if they register they would be required in completing the registration forms to "make public disclosure not only of their relation with their foreign principal, but of numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba." In concluding that petitioners must register, we do not suggest that they may be required to answer all the questions in the registration forms. The Government says that some of the questions are "clearly inapplicable" to petitioners, that others may satisfactorily be answered in conclusory language, and that others, while "framed in general terms," may satisfactorily be answered by disclosing only those facts which "bear a reasonable relationship to the representation of the foreign principal." Under the rules established by the Department of Justice and printed on the forms themselves:

> "If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement."

Compare, 28 CFR § 5.201. Since petitioners have made no attempt to determine which questions must be answered and how much information disclosed, this issue is not ripe for adjudication. See, *e. g., Eccles* v. *Peoples*

Bank, 333 U. S. 426. See generally, Davis, Ripeness of Governmental Action for Judicial Review (pts. 1–2), 68 Harv. L. Rev. 1122, 1326 (1955).

For these reasons, petitioners' complaint should be dismissed, and, accordingly, the judgment of the Court of Appeals ordering dismissal of the complaint is affirmed.

It is so ordered.

VAN DUSEN, U. S. DISTRICT JUDGE, ET AL. *v.* BARRACK, ADMINISTRATRIX, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 56 and 80. Argued January 8–9, 1964.—
Decided March 30, 1964.

Respondents, personal representatives of Pennsylvania decedents, instituted in the United States District Court for the Eastern District of Pennsylvania 40 wrongful death actions arising from an airplane crash in Massachusetts. Acting on petitioners' motion under § 1404 (a) of the Judicial Code of 1948, which provides for transfer of civil actions for the convenience of parties and witnesses, in the interest of justice, to any district where such action "might have been brought," the District Court ordered that the actions be transferred to the District of Massachusetts, where over 100 other actions arising out of the same disaster are pending. The Court of Appeals, interpreting § 1404 (a) and relying on Rule 17 (b) of the Federal Rules of Civil Procedure, vacated the transfer order, holding that it could be granted only if at the time the actions were filed respondents were personal representatives qualified to sue in Massachusetts courts. *Held:*

1. In § 1404 (a) the phrase "where it might have been brought" must be construed with reference to federal venue laws setting forth the districts where such actions "may be brought" and not with reference to the laws, such as those relating to damages and the capacity of personal representatives to sue, of the State where the transferee district court is located. Pp. 616–626.

2. In a case such as this where the actions were properly brought in the transferor district court and where defendants seek transfer under § 1404 (a), the change of venue should not be accompanied by a change in the governing state laws. Pp. 626–640.

3. Where a § 1404 (a) transfer is held not to effect a change of state law but essentially only to authorize a change of federal courtrooms, the provision in Rule 17 (b) that the capacity of personal representatives to sue or be sued shall be determined by the law of the State "in which the district court is held" should similarly be interpreted to refer to the law of the State in which the transferor District Court is located. Pp. 640–643.

4. The general criteria of convenience and fairness of § 1404 (a) include what witnesses may be heard, the evidence which will be relevant and important under the applicable state laws, and, also, consideration of the judicial familiarity with the governing state laws and the relative ease and practicality of trying the actions in the proposed transferee District Court. Pp. 643–646.

309 F. 2d 953, reversed and remanded.

Owen B. Rhoads argued the cause for petitioners in No. 56. With him on the briefs were *George J. Miller, J. Welles Henderson, Jr., J. Grant McCabe III* and *Sidney L. Wickenhaver.*

Morton Hollander argued the cause for petitioners in No. 80. With him on the brief were *Solicitor General Cox* and *Assistant Attorney General Douglas.*

John R. McConnell argued the cause for respondents. With him on the brief were *Seymour I. Toll, T. E. Byrne, Jr., Lee S. Kreindler, Abram P. Piwosky, Ralph Earle II, Abraham E. Freedman* and *Milton M. Borowsky.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case involves the construction and application of § 1404 (a) of the Judicial Code of 1948. Section 1404 (a), which allows a "change of venue" within the federal judicial system, provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404 (a).

The facts, which need but brief statement here, reveal that the disputed change of venue is set against the background of an alleged mass tort. On October 4, 1960, shortly after departing from a Boston airport, a commercial airliner, scheduled to fly from Boston to Philadelphia, plunged into Boston Harbor. As a result of the crash, over 150 actions for personal injury and wrongful death

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have been instituted against the airline, various manufacturers, the United States, and, in some cases, the Massachusetts Port Authority. In most of these actions the plaintiffs have alleged that the crash resulted from the defendants' negligence in permitting the aircraft's engines to ingest some birds. More than 100 actions were brought in the United States District Court for the District of Massachusetts, and more than 45 actions in the United States District Court for the Eastern District of Pennsylvania.

The present case concerns 40 of the wrongful death actions brought in the Eastern District of Pennsylvania by personal representatives of victims of the crash.[1] The defendants, petitioners in this Court, moved under § 1404 (a) to transfer these actions to the District of Massachusetts, where it was alleged that most of the witnesses resided and where over 100 other actions are pending. The District Court granted the motion, holding that the transfer was justified regardless of whether the transferred actions would be governed by the laws and choice-of-law rules of Pennsylvania or of Massachusetts. 204 F. Supp. 426. The District Court also specifically held that transfer was not precluded by the fact that the plaintiffs had not qualified under Massachusetts law to sue as representatives of the decedents. The plaintiffs, respondents in this Court, sought a writ of mandamus from the Court of Appeals and successfully contended that the District Court erred and should vacate its order of transfer. 309 F. 2d 953. The Court of Appeals held that a § 1404 (a) transfer could be granted only if at the time the suits were brought, the plaintiffs had qualified to sue in Massachusetts, the State of the transferee District Court. The Court of Appeals relied in part upon

[1] The plaintiffs are "Pennsylvania fiduciaries representing the estates of Pennsylvania decedents."

its interpretation of Rule 17 (b) of the Federal Rules of Civil Procedure.[2]

We granted certiorari to review important questions concerning the construction and operation of § 1404 (a). 372 U. S. 964. For reasons to be stated below, we hold that the judgment of the Court of Appeals must be reversed, that both the Court of Appeals and the District Court erred in their fundamental assumptions regarding the state law to be applied to an action transferred under § 1404 (a), and that accordingly the case must be remanded to the District Court.[3]

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[2] Rule 17 (b), Fed. Rules Civ. Proc., 28 U. S. C.: "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., §§ 754 and 959 (a)."

[3] Although it is clear that this Court has jurisdiction to review the judgment of the Court of Appeals, the Government, a defendant in this case, urges that the judgment below be reversed because mandamus was an improper remedy. However, in *Hoffman* v. *Blaski*, 363 U. S. 335, as the Government concedes, this Court reviewed decisions in § 1404 (a) transfer cases which the Court of Appeals reviewed through exercise of the mandamus power. See also *Norwood* v. *Kirkpatrick*, 349 U. S. 29; *Ex parte Collett*, 337 U. S. 55. Since in our opinion the courts below erred in interpreting the legal limitations upon and criteria for a § 1404 (a) transfer, we find it unnecessary to consider the mandamus contentions advanced by the Government. Cf. *Platt* v. *Minnesota Mining & Mfg. Co.*, *ante*, at 240.

I. Where the Action "Might Have Been Brought."

Section 1404 (a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice.[4] Thus, as the Court recognized in *Continental Grain Co.* v. *Barge FBL–585*, 364 U. S. 19, 26, 27, the purpose of the section is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense . . . ." To this end it empowers a district court to transfer "any civil action"[5] to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice. This transfer power is, however, expressly limited by the final clause of § 1404 (a) restricting transfer to those federal districts in which the action "might have been brought." Although in the present case the plaintiffs were qualified to bring suit as personal representatives under Pennsylvania law (the law of the State of the transferor federal court), the Court of Appeals ruled that the defendants' transfer motion must be denied because at the time the suits were brought in Pennsylvania (the transferor forum) the complainants had not obtained the appointments requisite to initiate such actions in Massachusetts (the transferee forum).

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[4] See, *e. g.*, *Norwood* v. *Kirkpatrick*, *supra*, at 32: "When Congress adopted § 1404 (a), it intended to do more than just codify the existing law on *forum non conveniens*. . . . Congress, in writing § 1404 (a), which was an entirely new section, was revising as well as codifying." 1 Moore, Federal Practice (2d ed., 1961), pp. 1751–1758.

[5] See *Ex parte Collett*, *supra*, and *United States* v. *National City Lines, Inc.*, 337 U. S. 78 (interpreting "any civil action" to include actions governed by special, as well as general, venue provisions).

At the outset, therefore, we must consider whether the incapacity of the plaintiffs at the time they commenced their actions in the transferor forum to sue under the state law of the transferee forum renders the latter forum impermissible under the "might-have-been-brought" limitation.

There is no question concerning the propriety either of venue or of jurisdiction in the District of Massachusetts, the proposed transferee forum.[6] The Court of Appeals conceded that it was "quite likely" that the plaintiffs could have obtained ancillary appointment in Massachusetts but held this legally irrelevant. 309 F. 2d, at 957–958. In concluding that the transfer could not be granted, the Court of Appeals relied upon *Hoffman* v. *Blaski*, 363 U. S. 335, as establishing that "unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404 (a)." 309 F. 2d, at 957. (Emphasis in original.) The court found the analogy to *Hoffman* particularly persuasive because it could "perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there." *Ibid.* In addition, the court held that the transfer must be denied because in actions by personal repre-

[6] See 204 F. Supp. 426, 437. Nor is there any question concerning the propriety either of venue or of jurisdiction in the Eastern District of Pennsylvania, the transferor forum. The District Court indicated that one of the cases arising from the Boston Harbor crash had "already been transferred due to improper venue . . . ." *Id.*, at 427, n. 1. The Court of Appeals noted that counsel suggested that two other cases "must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper." 309 F. 2d 953, at 958. The transfers ordered in these cases were not contested in the Court of Appeals, *ibid.*, and are not involved in the present case. See notes 11, 29, *infra*.

sentatives "Rule 17 (b), Fed.R.Civ.P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue." [7] *Id.*, at 958.

The defendants contend that the concluding phrase of § 1404 (a)—"where it might have been brought"—refers to those districts in which Congress has provided by its venue statutes that the action "may be brought." Applying this criterion, the defendants argue that the posture of the case under state law is irrelevant. They contend that *Hoffman* v. *Blaski, supra,* did not rule that the limitations of state law were relevant to determining where the action "might have been brought" but ruled only that the requirement prohibited transfer where the proposed transferee forum lacked both venue of the action and power to command jurisdiction over the defendants when the suits were originally instituted. The defendants contend further that the decision below is contrary to the policy underlying *Hoffman,* since this decision effectively enables a plaintiff, simply by failing to proceed in other potential forums and qualify as a personal representative, to restrict and frustrate efforts to have the action transferred to a federal forum which would be far more convenient and appropriate. Finally, with regard to the conclusion that Rule 17 (b) precludes transfer, the defendants argue that under § 1404 (a) the effect of the Rule, like the existence of different state laws in the transferee forum, is not relevant to a determination of where, as indicated by federal venue laws, the action "might have been brought." The defendants conclude that the effect of transfer upon potential state-law defenses and upon the state law applied under Rule 17 (b) should instead be considered and assessed with reference to the criterion that the transfer be "in the interest of justice." See *infra,* pp. 624–626, 640–643.

[7] The text of Rule 17 (b) is set forth in note 2, *supra.*

The plaintiffs respond emphasizing that they are "Pennsylvania fiduciaries representing the estates of Pennsylvania decedents." They were not and are not qualified to bring these or related actions in Massachusetts and their lack of capacity would, under Massachusetts law, constitute "an absolute defense." The plaintiffs contend that *Hoffman* v. *Blaski* established that transfer must be denied unless, at the time the action was brought, the complainant had an independent right to institute that action in the transferee forum regardless of the fact that the defendant in seeking transfer might expressly or implicitly agree to venue and jurisdiction in the transferee forum and waive defenses that would have been available only under the law of the transferee State. In addition, the plaintiffs argue, even if the limiting phrase "where-it-might-have-been-brought" relates only to federal venue laws, Rule 17 (b) expressly provides that the capacity of a fiduciary to sue in a United States district court shall be determined "by the law of the state in which the district court is held." The plaintiffs understand the language of the Rule to refer to the law of the State in which the transferee court is held rather than to the law of the State of the transferor court. They conclude that since they "were not qualified to sue in Massachusetts [the State in which the transferee court would be held], they were not qualified to sue in the United States district court in Massachusetts and the District of Massachusetts was not a district in which these actions 'might have been brought.' "

A. In *Hoffman* v. *Blaski* this Court first considered the nature of the limitation imposed by the words "where it might have been brought." The plaintiff opposed the defendant's motion to transfer on the ground that the proposed transferee forum lacked both "venue over the action and ability to command jurisdiction over the . . ."

defendant.[8] 363 U. S., at 337. The question, as stated by the Court, was "whether a District Court, in which a civil action has been properly brought, is empowered by § 1404 (a) to transfer the action, on the motion of the defendant, to a district in which the plaintiff did not have a *right* to bring it." *Id.*, at 336. (Emphasis in original.) The defendant emphasized that "venue, like jurisdiction over the person, may be waived." *Id.*, at 343. This Court held that, despite the defendant's waivers or consent, a forum which had been improper for both venue and service of process was not a forum where the action "might have been brought." [9]

In the present case the Court of Appeals concluded that transfer could not be granted because here, as in *Hoffman* v. *Blaski*, the plaintiffs did not have an "independent" or "unqualified" right to bring the actions in the transferee

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[8] In the two cases decided *sub nom. Hoffman* v. *Blaski, supra*, the petitioners conceded "that statutory venue did not exist over either of these actions in the respective transferee districts, and that the respective defendants were not within the reach of the process of the respective transferee courts." *Id.*, at 341.

[9] Two weeks after *Hoffman* the Court decided *Continental Grain Co.* v. *Barge FBL–585*, 364 U. S. 19. See *infra*, at 622. In that case a cargo owner, seeking damages from a barge owner, had joined in a single complaint an *in personam* claim against the barge owner and an *in rem* claim against the barge. The complaint was filed in the Federal District Court in New Orleans. At that time the barge, or the *res*, was in New Orleans. The plaintiff-cargo owner opposed a motion to transfer to the District Court in Memphis on the ground that the *in rem* claim could not have been brought in that forum which had only personal jurisdiction over the barge owner at the time the New Orleans suit was brought. The Court, rejecting this argument, held that for purposes of assessing where the litigation "might have been brought" the *in personam* and *in rem* claims should be practically viewed as a single "civil action" in which the complainant had chosen "an alternative way of bringing the owner into court." *Id.*, at 26. See Comment, 31 U. of Chi. L. Rev. 373 (1964).

forum.[10] The propriety of this analogy to *Hoffman* turns, however, on the validity of the assumption that the "where-it-might-have-been-brought" clause refers not only to federal venue statutes but also to the laws applied in the State of the transferee forum. It must be noted that the instant case, unlike *Hoffman*, involves a motion to transfer to a district in which both venue and jurisdiction are proper. This difference plainly demonstrates that the Court of Appeals extended the *Hoffman* decision and increased the restrictions on transfers to convenient federal forums. The issue here is not that presented in *Hoffman* but instead is whether the limiting words of § 1404 (a) prevent a change of venue within the federal system because, under the law of the State of the transferee forum, the plaintiff was not qualified to sue or might otherwise be frustrated or prejudiced in pursuing his action.

We cannot agree that the final clause of § 1404 (a) was intended to restrict the availability of convenient federal forums by referring to state-law rules, such as those concerning capacity to sue, which would have applied if the action had originally been instituted in the transferee federal court. Several considerations compel this conclusion. First, if the concluding clause is considered as an independent entity and perused for its plain meaning, it seems clear that the most obvious referents of the words are found in their immediate statutory context.[11] Sec-

[10] A similar rule had been applied in *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. S. D. Cal. 1955).

[11] See Note, 60 Yale L. J. 183 (1951). The analogous provisions of § 1406 (a), which shares the same statutory context, contain a similar phrase: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division *in which it could have been brought.*" 28 U. S. C. § 1406 (a). (Emphasis added.) See *Goldlawr, Inc.*, v. *Heiman*, 369

tion 1404 (a) was enacted as part of Chapter 87 of Part IV of the Judicial Code of 1948. That Chapter is designated "District Courts; Venue." The Chapter itself is in that Part of the Code dealing generally with "Jurisdiction and Venue." In the immediate Chapter, which includes §§ 1391–1406, the phrase "may be brought" recurs at least 10 times [12] and the phrase "may be prosecuted" at least 8 times.[13] The statutory context is thus persuasive evidence that the "might-have-been-brought" language of § 1404 (a) plainly refers to the similar wording in the related federal statutes and not directly to the laws of the State of the transferee forum.

Secondly, it should be asked whether the purposes of § 1404 (a) warrant a broad or generous construction of the limiting clause. The answer, we think, is quite evident. As MR. JUSTICE BLACK said, speaking for the Court in *Continental Grain Co.* v. *Barge FBL–585*, 364 U. S., at 26: "The idea behind § 1404 (a) is that where a 'civil action' to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court." This remedial purpose—the individualized, case-by-case consideration of convenience and fairness—militates against restricting the number of permissible forums within the federal system.[14]

U. S. 463; Hart and Wechsler, The Federal Courts and the Federal System (1953), p. 979; Comment, 30 U. of Chi. L. Rev. 735 (1963).

[12] 28 U. S. C. §§ 1391 (a)(b), 1392 (a)(b), 1393 (b), 1395 (d), 1396, 1397, 1399, 1400 (b).

[13] 28 U. S. C. §§ 1394, 1395 (a)(b)(c)(e), 1401, 1402 (a)(b). Other venue provisions in the same chapter of the Judicial Code use language such as: "may be sued," § 1391 (d); "must be brought," § 1393 (a); "shall be brought," §§ 1398, 1403; and "may be instituted," § 1400 (a).

[14] Note, 76 Harv. L. Rev. 1679, 1680 (1963).

There is no valid reason for reading the words "where it might have been brought" to narrow the range of permissible federal forums beyond those permitted by federal venue statutes which, after all, are generalized attempts to promote the same goals of convenience and fairness.

Finally, in construing § 1404 (a) we should consider whether a suggested interpretation would discriminatorily enable parties opposed to transfer, by means of their own acts or omissions, to prevent a transfer otherwise proper and warranted by convenience and justice. In *Continental Grain Co.* v. *Barge FBL–585, supra,* the plaintiff, having joined in a single complaint both *in rem* and *in personam* damage claims, opposed transfer to a convenient forum on the ground that the *in rem* claim could not have been brought in the transferee forum.[15] In approving the transfer order, this Court observed that failure to adopt a "common-sense approach . . . would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned. All a plaintiff would need to do to escape from it entirely would be to bring his action against both the owner and the ship, as was done here." *Id.,* at 24–25. The case at bar presents a similar situation. The Court of Appeals' decision would grant personal representatives bringing wrongful-death actions the power unilaterally to reduce the number of permissible federal forums simply by refraining from qualifying as representatives in States other than the one in which they wished to litigate. The extent of that power is graphically illustrated by the laws of the American jurisdictions, the vast majority of which require that, as a condition of qualifying to bring suit, a foreign executor or representative must obtain ancillary appointment

[15] See note 9, *supra.*

or perform some preliminary act.[16] The possibilities thus suggested by the facts of the present case amply demonstrate that the limiting phrase of § 1404 (a) should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just. The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum.

In summary, then, we hold that the words "where it might have been brought" must be construed with reference to the federal laws delimiting the districts in which such an action "may be brought" and not with reference to laws of the transferee State concerning the capacity of fiduciaries to bring suit.

B. The Court of Appeals, in reversing the District Court, relied in part upon Rule 17 (b) of the Federal Rules of Civil Procedure. The relevant portion of the Rule provides that the capacity of personal representatives "to sue or be sued shall be determined by the law of the state in which the district court is held." [17] In our view the "where-it-might-have-been-brought" clause does not refer to this Rule and the effect of the Rule, therefore, raises a separate question. This conclusion does not, however, establish that Rule 17 (b), if applied as interpreted by the Court of Appeals, would not preclude the requested transfer. The reliance placed on Rule 17 (b) necessarily assumes that its language—which is

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[16] See Note, 17 Rutgers L. Rev. 664, 668 (1963); 52 A. L. R. 2d 1048. The implications of the Court of Appeals' decision are plainly indicated by two subsequent decisions, *Goranson* v. *Capital Airlines, Inc.*, 221 F. Supp. 820 (D. C. E. D. Va.), and *Thompson* v. *Capital Airlines, Inc.*, 220 F. Supp. 140 (D. C. S. D. N. Y.).

[17] The text of Rule 17 (b) is set forth in note 2, *supra*.

not free from ambiguity—requires the application of the law of the State of the transferee district court rather than that of the transferor district court.[18] On this assumption, the defendants in the present case, after a transfer to Massachusetts, would be entitled to raise the defense of incapacity under Massachusetts law and thereby defeat the actions. Thus a § 1404 (a) transfer might result in a prejudicial change in the applicable state law. This possibility makes it apparent, that, although Rule 17 (b) may be irrelevant to a determination of where an action "might have been brought," the effect of the Rule may necessarily render a change of venue against the "interest of justice."

Although the Court of Appeals specifically relied on Rule 17 (b), in our opinion the underlying and fundamental question is whether, in a case such as the present, a change of venue within the federal system is to be accompanied by a change in the applicable state law.[19] Whenever the law of the transferee State significantly differs from that of the transferor State—whether that difference relates to capacity to sue, statutes of limitations, or "substantive" rules of liability—it becomes nec-

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[18] See the rationale adopted in *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (relied upon by the Court of Appeals in the present case, 309 F. 2d, at 957).

[19] It has been observed that in the present case "the [Court of Appeals'] foray into Massachusetts substantive law need never have been undertaken had the court been confident that the transferee forum would treat the question of qualification as governed by the doctrine . . . that the transferee court should apply the law of the transferor forum." Note, 76 Harv. L. Rev. 1679, 1681 (1963). Similarly, it has been noted that if under the Court of Appeals decision "there is no significant difference between venue-jurisdiction and capacity, there may be no adequate difference between capacity and a host of other defensive bars that may foreseeably subject a plaintiff to dismissal." Note, 17 Rutgers L. Rev. 664, 666 (1963); cf. Comment, 51 Col. L. Rev. 762, 771 (1951).

essary to consider what bearing a change of venue, if accompanied by a change in state law, would have on "the interest of justice." This fundamental question underlies the problem of the interpretation of the words of Rule 17 (b) and requires a determination of whether the existence of differing state laws would necessarily render a transfer against "the interest of justice." In view of the facts of this case and their bearing on this basic question, we must consider first, insofar as is relevant, the relationship between a change of venue under § 1404 (a) and the applicable state law.

II. "The Interest of Justice": Effect of a Change of Venue Upon Applicable State Law.

A. The plaintiffs contend that the change of venue ordered by the District Court was necessarily precluded by the likelihood that it would be accompanied by a highly prejudicial change in the applicable state law. The prejudice alleged is not limited to that which might flow from the Massachusetts laws governing capacity to sue. Indeed, the plaintiffs emphasize the likelihood that the defendants' "ultimate reason for seeking transfer is to move to a forum where recoveries for wrongful death are restricted to sharply limited punitive damages rather than compensation for the loss suffered." [20] It is argued that Pennsylvania choice-of-law rules would result in the application of laws substantially different from those that would be applied by courts sitting in Massachusetts. The District Court held, however, that transfer could be ordered regardless of the state laws and choice-of-law rules to be applied in the transferee forum and regardless

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[20] See Cavers, Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem, in A. L. I., Study of the Division of Jurisdiction between State and Federal Courts (Tent. Draft No. 1, 1963), pp. 154, 193.

of the possibility that the laws applicable in the transferor State would significantly differ from those applicable in the transferee State. This ruling assumed that transfer to a more convenient forum may be granted on a defendant's motion even though that transfer would seriously prejudice the plaintiff's legal claim. If this assumption is valid, the plaintiffs argue, transfer is necessarily precluded—regardless of convenience and other considerations—as against the "interest of justice" in dealing with plaintiffs who have either exercised the venue privilege conferred by federal statutes, or had their cases removed from state into federal court.

If conflict of laws rules are laid aside, it is clear that Massachusetts (the State of the transferee court) and Pennsylvania (the State of the transferor court) have significantly different laws concerning recovery for wrongful death. The Massachusetts Death Act provides that one who negligently causes the death of another "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability . . . ." Mass. Ann. Laws, c. 229, § 2 (Supp. 1961). By contrast, under Pennsylvania law the recovery of damages (1) is based upon the more common principle of compensation for losses rather than upon the degree of the tortfeasor's culpability and (2) is not limited to $20,000.[21] Some of the defendants urge, however, that

[21] In *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U. S. 128, this Court reviewed the relationship between the provisions of the Federal Tort Claims Act and the principles of the Massachusetts Death Act. Only two States, Alabama and Massachusetts, "award only punitive damages for wrongful deaths." *Id.*, at 130–131. The Court stated: "The assessment of damages with reference to the degree of culpability of the tort-feasor, rather than with reference to the amount of pecuniary loss suffered by the next of kin, makes those damages punitive in nature. That has been the

these differences are irrelevant to the present case because Pennsylvania state courts, applying their own choice of law rules, would require that the Massachusetts Death Act be applied in its entirety, including its culpability principle and damage limitation.[22] It follows that a federal district court sitting in Pennsylvania, and referring, as is required by *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.*, 313 U. S. 487, to Pennsylvania choice-of-law rules, would therefore be applying the same substantive rules as would a state or federal court in Massachusetts if the actions had been commenced there. This argument highlights the fact that the most convenient forum is frequently the place where the cause of action arose and that the conflict-of-laws rules of other States may often refer to the substantive rules of the more convenient forum.[23] The plaintiffs, however, point to the decision of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, 172 N. E. 2d 526, and the decision of the Court of Appeals for the Second Circuit in *Pearson* v. *Northeast Airlines, Inc.*, 309 F. 2d 553, cert. denied, 372 U. S. 912, as indicating that Pennsylvania, in light of its laws and policies,

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holding of the Supreme Judicial Court of Massachusetts. . . . The standard of liability under the Massachusetts Death Act is punitive—*i. e.*, 'with reference to the degree' of culpability—not compensatory. . . . There is nothing in the Massachusetts law which measures the damages by 'pecuniary injuries.'" *Id.*, at 129, 132, 133. *E. g.*, *Beatty* v. *Fox*, 328 Mass. 216, 102 N. E. 2d 781; *Macchiaroli* v. *Howell*, 294 Mass. 144, 200 N. E. 905; *Boott Mills* v. *Boston & M. R. Co.*, 218 Mass. 582, 106 N. E. 680; *Bagley* v. *Small*, 92 N. H. 107, 26 A. 2d 23. Compare 12 Purdon's Pa. Stat. Ann. §§ 1601–1604; *Spangler* v. *Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A. 2d 490; cf. *Thirteenth & Fifteenth Street Passenger R. Co.* v. *Boudrou*, 92 Pa. 475, 481–482.

[22] Cf. *Goranson* v. *Kloeb*, 308 F. 2d 655.

[23] See Blume, Place of Trial of Civil Cases, 48 Mich L. Rev. 1, 37 (1949).

might not apply the culpability and damage limitation aspects of the Massachusetts statute. The District Court, in ordering that the actions be transferred, found it both undesirable and unnecessary to rule on the question of whether Pennsylvania courts would accept the right of action provided by the Massachusetts statute while at the same time denying enforcement of the Massachusetts measure of recovery.[24] 204 F. Supp., at 433–436. The District Court found it undesirable to resolve this question because the Pennsylvania courts had not yet considered it and because they would, in view of similar pending cases, soon have an opportunity to do so. The District Court, being of the opinion that the District of Massachusetts was in any event a more convenient place for trial, reasoned that the transfer should be granted forthwith and that the transferee court could proceed to the trial of the actions and postpone consideration of the Pennsylvania choice-of-law rule as to damages until a later time at which the Pennsylvania decisions might well have supplied useful guidance. Fundamentally, however, the transferring District Court assumed that the Pennsylvania choice of law rule was irrelevant because the transfer would be permissible and justified even if accompanied by a significant change of law.

The possibilities suggested by the plaintiffs' argument illustrate the difficulties that would arise if a change of venue, granted at the motion of a defendant, were to result in a change of law. Although in the present case the contentions concern rules relating to capacity to sue and damages, in other cases the transferee forum might have a shorter statute of limitations or might refuse to

[24] The defendants, rejecting the view adopted by the Second Circuit in *Pearson* v. *Northeast Airlines, Inc.*, 309 F. 2d 553, contend that the Full Faith and Credit Clause requires Pennsylvania courts to follow all the terms of the Massachusetts Death Act. We intimate no view concerning this contention.

adjudicate a claim which would have been actionable in the transferor State. In such cases a defendant's motion to transfer could be tantamount to a motion to dismiss.[25] In light, therefore, of this background and the facts of the present case, we need not and do not consider the merits of the contentions concerning the meaning and proper application of Pennsylvania's laws and choice of law rules. For present purposes it is enough that the potential prejudice to the plaintiffs is so substantial as to require review of the assumption that a change of state law would be a permissible result of transfer under § 1404 (a).

The decisions of the lower federal courts, taken as a whole, reveal that courts construing § 1404 (a) have been strongly inclined to protect plaintiffs against the risk that transfer might be accompanied by a prejudicial change in applicable state laws.[26] Although the federal courts have

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[25] See, *e. g.*, Note, 64 Harv. L. Rev. 1347, 1354–1355 (1951), which assumes that changes of venue might be accompanied by changes of law and concludes that: "To make the transfer purely for reasons of convenience, without considering the difference in law, would amount to directing a verdict on the merits without examining them."

[26] See *H. L. Green Co., Inc.*, v. *MacMahon*, 312 F. 2d 650; *Benton* v. *Vinson, Elkins, Weems & Searls*, 255 F. 2d 299; *Headrick* v. *Atchison, T. & S. F. R. Co.*, 182 F. 2d 305. See also, *e. g.*, *King Bros. Productions, Inc.*, v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271; *Gomez* v. *The SS Dorothy*, 183 F. Supp. 499; *Hargrove* v. *Louisville & N. R. Co.*, 153 F. Supp. 681; *Heaton* v. *Southern R. Co.*, 119 F. Supp. 658; *Frechoux* v. *Lykes Bros. S. S. Co., Inc.*, 118 F. Supp. 234; *Greve* v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410; cf. *Curry* v. *States Marine Corp. of Delaware*, 118 F. Supp. 234. But cf. *Goranson* v. *Kloeb*, 308 F. 2d 655 (transfer granted because, even assuming transferee law applied, the substantive rules would be identical); *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (see note 18, *supra*); *Curry* v. *States Marine Corp. of Delaware*, *supra* (transfer denied upon failure of parties to stipulate that transferor statute of limitations would apply). See also authorities cited, note 39, *infra*.

utilized a variety of doctrines in order to approve a desirable transfer and at the same time protect the plaintiffs,[27] the prevailing view in the lower federal courts is that adopted by the Court of Appeals for the Tenth Circuit in 1950, only two years after the enactment of § 1404 (a), in *Headrick* v. *Atchison, T. & S. F. R. Co.*, 182 F. 2d 305, and further developed in the recent decision of the Court of Appeals for the Second Circuit in *H. L. Green Co., Inc.*, v. *MacMahon*, 312 F. 2d 650. These cases have adopted and applied a general interpretative principle which we believe faithfully reflects the purposes underlying § 1404 (a).

In *Headrick* v. *Atchison, T. & S. F. R. Co., supra,* the plaintiff, a Missouri citizen, had been injured in an accident in California. He contended that responsibility lay with the defendant railroad, a Kansas corporation doing business in a number of States. The plaintiff's Missouri attorney entered into settlement negotiations with the defendant but "these negotiations continued until after an action was barred by the statute of limitations of California; [and] thereafter the attorney was advised that the defendant would rely upon such statute as a bar to the plaintiff's claim . . . ." *Id.*, at 307. The plaintiff thereupon filed his action in a state court in New Mexico, where the defendant was amenable to process and where, by virtue of a longer statute of limitations, suit was not barred. The defendant then removed the case to the United States District Court for the District of New Mexico on the ground of diversity. In the District Court the

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[27] Frequently courts, dealing with a defendant's motion to transfer, have relied at least in part upon a transfer-on-condition or estoppel approach to grant transfer and protect the plaintiff. *E. g., Frechoux* v. *Lykes Bros. S. S. Co., supra; Greve* v. *Gibraltar Enterprises, Inc., supra; Crawford* v. *The SS Shirley Lykes*, 148 F. Supp. 958; *May* v. *The Steel Navigator*, 152 F. Supp. 254; *Hokanson* v. *Helene Curtis Industries, Inc.*, 177 F. Supp. 701.

defendant moved for dismissal "or in the alternative to transfer the cause to the United States District Court of California, Northern Division, pursuant to . . . § 1404 (a)." *Ibid.* The court denied the transfer, indicating "that it would have transferred the action to California had the statute of limitations of that state not run, but since it had, a transfer would be futile and unavailing." *Id.*, at 308. The Court of Appeals reversed, observing first that the plaintiff:

> "had a legal right to select any forum where the defendant was amenable to process and no contention is made here that the case was not properly brought in the New Mexico state court. It is conceded that the action is not barred by the New Mexico statute. Had the case been tried in the New Mexico state court, the procedural laws of New Mexico including the statutes of limitations would be applicable. . . . [I]n removal cases the Federal Court must apply the state law and the state policy." *Id.*, at 309.

From this it followed, the court concluded, that:

> "Upon removal to the Federal Court in New Mexico, the case would remain a New Mexico case controlled by the law and policy of that state, and if § 1404 (a) is applicable and a transfer to the California court is ordered for the convenience of the parties the witnesses and in the interests of justice, there is no logical reason why it should not remain a New Mexico case still controlled by the law and policy of that state." *Id.*, at 309–310.

Although the cases following the *Headrick* principle have usually involved a similar problem concerning statutes of limitations, the Court of Appeals for the Second Circuit plainly indicated in *H. L. Green Co., Inc.*, v. *Mac-*

Mahon, supra, that the *Headrick* rule was equally applicable to other laws of the transferor State, including choice-of-law rules, which might affect the outcome of the litigation. The plaintiff in that case brought an action under the Securities Exchange Act in the District Court for the Southern District of New York and there moved to amend his complaint to add a common-law claim arising under New York law. Without ruling on the motion to add to the complaint, the District Court granted a motion by the defendant to transfer to the Southern District of Alabama pursuant to § 1404 (a). The plaintiff objected to transfer not only because the Alabama statute of limitations would be unfavorable but also because prejudice would result from applying Alabama law "to the common law claim [which the plaintiff] has moved to join with the statutory claim." 312 F. 2d, at 652. The Court of Appeals rejected these contentions:

> "Although as a matter of federal policy a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state law should be unaffected. The case should remain as it was in all respects but location. Headrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305 . . . ." *Id.,* at 652–653.

The Court made the import of this rule plain by expressly declaring first that the transferee court sitting in Alabama should apply New York law in ruling on the motion to add to the complaint and, secondly, that if the complaint were thus amended, the transferee court "will apply New York law (including any relevant New York choice-of-law rules)." *Id.,* at 654.

Of course these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404 (a) to jus-

tify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue. In this regard the transfer provisions of § 1404 (a) may be compared with those of § 1406 (a).[28] Although both sections were broadly designed to allow transfer instead of dismissal, § 1406 (a) provides for transfer from forums in which venue is wrongly or improperly laid, whereas, in contrast, § 1404 (a) operates on the premise that the plaintiff has properly exercised his venue privilege.[29] This distinction underlines the fact that Congress, in passing § 1404 (a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one.[30]

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[28] See note 11, *supra*.

[29] In *Viaggio* v. *Field*, 177 F. Supp. 643, 648, the District Court suggested that cases where defendants sought transfer under § 1404 (a) were the "converse of the situation . . . in the instant case [under § 1406 (a)] where it is the plaintiff who brought the suit incorrectly in this court and is now asking to have it transferred to another court and hopes thereby to obtain an advantage with respect to [the transferee state's statute of] limitations." See *Skilling* v. *Funk Aircraft Co.*, 173 F. Supp. 939; Comment, 61 Col. L. Rev. 902, 914 (1961); Comment, 30 U. of Chi. L. Rev. 735, 745, n. 68 (1963); Comment, 1962 Wis. L. Rev. 342, 354. Cf. *Goldlawr, Inc.*, v. *Heiman*, 369 U. S., at 466–467. See note 6, *supra*.

[30] See *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507: "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy." The Revisor's Note to § 1404 (a) states that it "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S. Ct. 6, 314 U. S. 44, 86

In considering the Judicial Code, Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions. The venue provision of the Federal Employers' Liability Act was the subject of special concern.[31] However, while the Judicial Code was pending, Congress considered and rejected the Jennings bill which, as the Court stated in *Ex parte Collett*, 337 U. S. 55, 64, "was far more drastic than § 1404 (a)," and which "would in large part have repealed [the venue section] of the Liability Act" by severely delimiting the permissible forums.[32] This legislative background supports the view that § 1404 (a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative

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L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." Revision of Title 28, United States Code, Report of the House Committee on Revision of the Laws on H. R. 7124, 79th Cong., 2d Sess., p. A127.

[31] See *Ex parte Collett, supra,* at 68–69; Revisor's Note following § 1404 (a) (note 30, *supra*); Moore, Commentary on the U. S. Judicial Code (1949), p. 206.

[32] In *Ex parte Collett, supra,* at 60, the Court observed: "Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. *The two sections deal with two separate and distinct problems.* Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously." (Emphasis added.)

history of § 1404 (a) certainly does not justify the rather startling conclusion that one might "get a change of law as a bonus for a change of venue." [33] Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404 (a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument.[34] And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum.[35] We believe, therefore, that both the history and purposes of § 1404 (a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally

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[33] Mr. Justice Jackson, dissenting in *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 522, expressed dismay at what he viewed as such a suggestion: "Are we then to understand that parties may get a change of law as a bonus for a change of venue? If the law of the forum in which the case is tried is to be the sole test of substantive law, burden of proof, contributory negligence, measure of damages, limitations, admission of evidence, conflict of laws and other doctrines, . . . then shopping for a favorable law via the [transfer] route opens up possibilities of conflict, confusion and injustice greater than anything *Swift* v. *Tyson*, 16 Pet. 1, ever held."

[34] See Currie, Change of Venue and the Conflict of Laws, 22 U. of Chi. L. Rev. 405, 441 (1955): "If it should be established as a rule of thumb that the transferee court is to apply the law of the state in which it sits, every case in which there is a difference of law between the original and the transferee state would become a game of chess, with Section 1404 (a) authorizing a knight's move; and nothing would be certain except that the parties would land on a square of a different color."

[35] See, *e. g.*, Note, 64 Harv. L. Rev. 1347, 1355 (1951): "It would seem best, therefore, not to transfer at all where the law which would be applied in the transferee forum would be materially different from that applied by the transferring court."

intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.[36]

Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. This Court has often formulated the *Erie* doctrine by stating that it establishes "the principle of uniformity within a state," *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.*, 313 U. S. 487, 496, and declaring that federal courts in diversity of citizenship cases are to apply the laws "of the states in which they sit," *Griffin* v. *McCoach*, 313 U. S. 498, 503.[37] A superficial reading of these formulations might suggest that a transferee federal court should apply the law of the State in which it

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[36] For recent proposals, see A. L. I., Study of the Division of Jurisdiction between State and Federal Courts (Tent. Draft No. 1, 1963), §§ 1306, 1307, 1308. The commentary on the proposed § 1306 notes that, where the defendant seeks transfer, the section would provide "that the transferee court shall apply the rules which the transferor court would have been bound to apply. . . . The effect is to give the plaintiff the benefit which traditionally he has had in the selection of a forum with favorable choice-of-law rules. . . . It may be thought undesirable to let the plaintiff reap a choice-of-law benefit from the deliberate selection of an inconvenient forum. In a sense this is so, but the alternatives seem even more undesirable. If the rules of the State where the transferee district is located were to control, the judge exercising his discretion upon a motion for transfer might well make a ruling decisive of the merits of the case. Whether he should simply decide the appropriate place for trial, letting the choice-of-law bonus fall as it may, or include in his consideration of 'the interest of justice' the 'just' choice-of-law rule, the result is unfortunate. . . ." *Id.*, at 65–66.

[37] See also, *e. g.*, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 ("a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . .").

sits rather than the law of the transferor State. Such a reading, however, directly contradicts the fundamental *Erie* doctrine which the quoted formulations were designed to express. As this Court said in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109:

> "*Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. . . . The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Applying this analysis to § 1404 (a), we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. This purpose would be defeated in cases such as the present if nonresident defendants, properly subjected to suit in the transferor State (Pennsylvania), could invoke § 1404 (a) to gain the benefits of the laws of another jurisdiction (Massachusetts). What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; [38] and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they

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[38] In *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.*, 313 U. S. 487, 496, the Court observed that: "Whatever lack of uniformity [the *Erie* doctrine] may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." See note 36, *supra*.

sit" should not obscure that, in applying the same reasoning to § 1404 (a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.[39]

We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404 (a) generally should be, with respect to state law, but a change of courtrooms.[40]

We, therefore, reject the plaintiffs' contention that the transfer was necessarily precluded by the likelihood that a prejudicial change of law would result. In so ruling, however, we do not and need not consider whether in all cases § 1404 (a) would require the application of the law of the transferor, as opposed to the transferee, State.[41]

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[39] See cases cited, notes 26–27, *supra*. See 1 Moore, *supra*, at 1772–1777; Currie, Change of Venue and the Conflict of Laws, 22 U. of Chi. L. Rev. 405, 410–413, 438–439 (1955); Currie, Change of Venue and the Conflict of Laws: A Retraction, 27 U. of Chi. L. Rev. 341 (1960); Note, 60 Yale L. J. 537 (1951). But see Kaufman, Observations on Transfers under § 1404 (a) of the New Judicial Code, 10 F. R. D. 595, 601 (1951); Note, 64 Harv. L. Rev. 1347, 1354–1355 (1951); cf. Note, 35 Cornell L. Q. 459, 462, 464 (1950).

[40] Of course the transferee District Court may apply its own rules governing the conduct and dispatch of cases in its court. We are only concerned here with those state laws of the transferor State which would significantly affect the outcome of the case.

[41] We do not suggest that the application of transferor state law is free from constitutional limitations. See, *e. g.*, *Watson* v. *Employers Liability Assurance Corp., Ltd.*, 348 U. S. 66; *Hughes* v. *Fetter*, 341 U. S. 609; *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532; *Home Ins. Co.* v. *Dick*, 281 U. S. 397.

We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404 (a)[42] or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*.[43]

B. It is in light of the foregoing analysis that we must consider the interpretation of Rule 17 (b) of the Federal Rules of Civil Procedure and the relationship between that Rule and the laws applicable following a § 1404 (a) transfer. As indicated, *supra*, at 619, the plaintiffs contend that transfer cannot be granted because, although they are fully qualified as personal representatives to sue in courts in Pennsylvania, they lack the qualifications necessary to sue in Massachusetts. Rule 17 (b) provides that for such personal representatives "capacity to sue or be sued shall be determined by the law of the state in which the district court is held."[44] The question arising here is whether the Court of Appeals was correct in assuming that, in the context of a § 1404 (a) transfer between district courts, the language of the Rule referred to the law of the State in which the transferee district court is held, rather than to the law of the State of the transferor district court.

The plaintiffs, arguing that Rule 17 (b) refers only to the transferee district court, suggest that their interpre-

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[42] Cf. note 29, *supra*.

[43] Compare Currie, Change of Venue and the Conflict of Laws: A Retraction, 27 U. of Chi. L. Rev., at 348 (1960); with Note, 60 Yale L. J. 537, 539–541 (1951). In *Parsons* v. *Chesapeake & O. R. Co.*, 375 U. S. 71, involving a suit arising under the Federal Employers' Liability Act, the Court ruled in a *per curiam* opinion that: "a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404 (a)." *Id.*, at 73–74.

[44] The text of Rule 17 (b) is set forth in note 2, *supra*.

tation is necessary to protect the interest of States in controlling the qualifications of foreign fiduciaries. The plaintiffs state that the vast majority of American jurisdictions permit only locally qualified foreign representatives because safeguards are needed "to protect local citizens who are potential defendants from suits by more than one fiduciary purporting to represent the same decedent and protect all persons from losses caused by the actions of irresponsible out-of-state fiduciaries." These considerations do not, however, support the plaintiffs' interpretation of Rule 17 (b).[45] In the present case, for example, it is conceded that the plaintiffs are qualified as personal representatives under the laws of the transferor State (Pennsylvania). It seems clear that the defendants, who are seeking transfer to another jurisdiction, will be equitably protected if Rule 17 (b) is interpreted to refer to the laws of the transferor State (Pennsylvania). It would be ironic if Rule 17 (b) were construed so that these plaintiffs could defeat transfer by arguing that the defendants would receive inadequate protection against "foreign" fiduciaries.

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[45] The Court of Appeals, referring to Rule 17 (b), observed: "That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states." 309 F. 2d, at 958. This assumes that it is consistent with the purposes of Rule 17 (b) that the governing or prevailing "state policy" be the policy of the transferee State rather than that of the transferor State. Since, however, the actions when originally instituted were subject to the transferor State's laws, it is misleading to suggest that the continued application of those laws would "alter" state policy. To the contrary, if the plaintiffs have selected a proper state forum and have qualified therein as personal representatives, the policy of that State would be "altered" if as a result of the defendants' motion to transfer under § 1404 (a) the plaintiffs lost their status as qualified representatives.

We think it is clear that the Rule's reference to the State "in which the district court is held" was intended to achieve the same basic uniformity between state and federal courts as was intended by the decisions which have formulated the *Erie* policy in terms of requiring federal courts to apply the laws of the States "in which they sit." [46] See *supra*, at 637–639. The plaintiffs' argument assumes,[47] incorrectly we think, that the critical phrase—"in which the district court is held"—carries a plain meaning which governs even in the case of a § 1404 (a) transfer involving two district courts sitting in different States. It should be remembered, however, that this phrase, like those which were formulated to express the *Erie* doctrine, was employed long before the enactment of a § 1404 (a) provision for transfer within the federal system.[48] We believe that Rule 17 (b) was intended to work an accommodation of interests within our federal system and that in interpreting it in new contexts we should look to its guiding policy and keep it "free from entanglements with analytical or terminological niceties." Cf. *Guaranty Trust Co.* v. *York*, 326 U. S., at 110.

Since in this case the transferee district court must under § 1404 (a) apply the laws of the State of the transferor district court, it follows in our view that Rule 17 (b) must be interpreted similarly so that the capacity to sue will also be governed by the laws of the transferor State. Where a § 1404 (a) transfer is thus held not to effect a change of law but essentially only to authorize a change of courtrooms, the reference in Rule 17 (b) to the

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[46] Cf. Note, 62 Harv. L. Rev. 1030, 1037–1041 (1949).

[47] See *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577, 581–582 (note 18, *supra*).

[48] The relevant provisions of Rule 17 (b) were adopted by this Court and transmitted to Congress on December 20, 1937. See 308 U. S. 649, 685. Section 1404 (a) was first enacted in the Judicial Code of 1948.

law of the State "in which the district court is held" should be applied in a corresponding manner so that it will refer to the district court which sits in the State that will generally be the source of applicable laws. We conclude, therefore, that the Court of Appeals misconceived the meaning and application of Rule 17 (b) and erred in holding that it required the denial of the § 1404 (a) transfer.

III. Applicable Law: Effect on the Convenience of Parties and Witnesses.

The holding that a § 1404 (a) transfer would not alter the state law to be applied does not dispose of the question of whether the proposed transfer can be justified when measured against the relevant criteria of convenience and fairness. Though the answer to this question does not follow automatically from the determination that the transferred actions will carry with them the transferor's laws, that determination nevertheless may make the transfer more—or less—practical and desirable. The matters to be weighed in assessing convenience and fairness are pervasively shaped by the contours of the applicable laws. The legal rules obviously govern what facts will be relevant and irrelevant, what witnesses may be heard, what evidence will be most vital, and so on. Not only do the rules thus affect the convenience of a given place of trial but they also bear on considerations such as judicial familiarity with the governing laws and the relative ease and practicality of trying the cases in the alternative forums.

In the present case the District Court held that the requested transfer could and should be granted regardless of whether the laws of the transferor State or of the transferee State were to be applied. 204 F. Supp., at 433–436. The court based its ruling on a general finding that transfer to Massachusetts would be sufficiently convenient and

fair under the laws of either Pennsylvania or Massachusetts. We do not attempt to review this general conclusion or to reassess the discretion that was exercised. We do conclude, however, that the District Court in assuming that the transferee court would be free to determine which State's laws were to be applied, overlooked or did not adequately consider several criteria or factors the relevance of which is made more apparent when it is recognized that even after transfer the laws of the transferor State will continue to apply.

It is apparent that the desirability of transfer might be significantly affected if Pennsylvania courts decided that, in actions such as the present, they would recognize the cause of action based on the Massachusetts Death Act but would not apply that statute's culpability principle and damage limitation. In regard to this possibility it is relevant to note that the District Court in transferring these actions generally assumed that transfer to Massachusetts would facilitate the consolidation of these cases with those now pending in the Massachusetts District Court and that, as a result, transfer would be accompanied by the full benefits of consolidation and uniformity of result. 204 F. Supp., at 431–432. Since, however, Pennsylvania laws would govern the trial of the transferred cases, insofar as those laws may be significantly different from the laws governing the cases already pending in Massachusetts, the feasibility of consolidation and the benefits therefrom may be substantially altered. Moreover, if the transferred actions would not be subject to the Massachusetts culpability and damage limitation provisions, then the plaintiffs might find a relatively greater need for compensatory damage witnesses to testify with regard to the economic losses suffered by individuals. It is possible that such a difference in damage rules could make the plaintiffs relatively more dependent upon witnesses more conveniently located for a trial in Penn-

sylvania. In addition, it has long been recognized that: "There is an appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 509. Thus, to the extent that Pennsylvania laws are difficult or unclear and might not defer to Massachusetts laws, it may be advantageous to retain the actions in Pennsylvania where the judges possess a more ready familiarity with the local laws.

If, on the other hand, Pennsylvania courts would apply the Massachusetts Death Act in its entirety, these same factors might well weigh quite differently. Consolidation of the transferred cases with those now pending in Massachusetts might be freed from any potential difficulties and rendered more desirable. The plaintiffs' need for witnesses residing in Pennsylvania might be significantly reduced. And, of course, the trial would be held in the State in which the causes of action arose and in which the federal judges are more familiar with the governing laws.

In pointing to these considerations, we are fully aware that the District Court concluded that the relevant Pennsylvania law was unsettled, that its determination involved difficult questions, and that in the near future Pennsylvania courts might provide guidance.[49] We think that this uncertainty, however, should itself have been considered as a factor bearing on the desirability of transfer. Section 1404 (a) provides for transfer to a more

[49] 204 F. Supp., at 435 and n. 20. The District Court opinion was filed in April 1962. The defendants allege that a subsequent Pennsylvania decision, *Griffith* v. *United Air Lines, Inc.* (Pa. C. P., Phila. Cty., June Term, 1962, No. 2013), indicates that Pennsylvania courts would accept and apply the Massachusetts Death Act in its entirety. Of course we intimate no view with respect to this contention.

convenient forum, not to a forum likely to prove equally convenient or inconvenient. We do not suggest that elements of uncertainty in transferor state law would alone justify a denial of transfer; but we do think that the uncertainty is one factor, among others, to be considered in assessing the desirability of transfer.

We have not singled out the above criteria for the purpose of suggesting either that they are of controlling importance or that the criteria actually relied upon by the District Court were improper. We have concluded, however, that the District Court ignored certain considerations which might well have been more clearly appraised and might have been considered controlling had not that court assumed that even after transfer to Massachusetts the transferee District Court would be free to decide that the law of its State might apply. It is appropriate, therefore, to reverse the judgment of the Court of Appeals and to remand to the District Court to reconsider the motion to transfer.

Accordingly, the judgment of the Court of Appeals for the Third Circuit is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK concurs in the reversal substantially for the reasons set forth in the opinion of the Court, but he believes that, under the circumstances shown in the opinion, this Court should now hold it was error to order these actions transferred to the District of Massachusetts.

IN RE CROW.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 767. Decided March 30, 1964.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

William B. Saxbe, Attorney General of Ohio, for the Supreme Court of Ohio, in opposition.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

PORT OF BROOKINGS ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 771. Decided March 30, 1964.

Affirmed.

Lloyd Hammel, Assistant Attorney General of Oregon, and *Sidney Teiser* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane, H. Neil Garson and *Betty Jo Christian* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

SUBURBAN TELEPHONE CO. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. ET AL.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 800. Decided March 30, 1964.

Appeal dismissed and certiorari denied.
Reported below: 72 N. M. 411, 384 P. 2d 684.

J. Kenneth Baird and *Robert A. Sprecher* for appellant.

J. H. Shepherd for Mountain States Telephone & Telegraph Co., and *Julian S. Ertz* for Tadlock et al., appellees.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

CARTER *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 817. Decided March 30, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 155 So. 2d 787.

Hal S. Ives for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

SELLS ET AL. *v.* WELSH, GOVERNOR OF INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 803. Decided March 30, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 244 Ind. 423, 192 N. E. 2d 753.

Lloyd L. DeWester, Jr. and *J. Albert Woll* for appellants.

Alan W. Boyd for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

O'BRYAN *v.* OKLAHOMA EX REL. OKLAHOMA BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 812. Decided March 30, 1964.

Appeal dismissed and certiorari denied.
Reported below: 385 P. 2d 876.

William D. Fore and *W. Howard O'Bryan, Jr.* for appellant.

Claude H. Rosenstein for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

HAMILTON *v.* ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 793. Decided March 30, 1964.

Certiorari granted and judgment reversed.
Reported below: 275 Ala. 574, 156 So. 2d 926.

Jack Greenberg, James M. Nabrit III and *Oscar W. Adams, Jr.* for petitioner.

Richmond M. Flowers, Attorney General of Alabama, and *Bernard F. Sykes* and *Owen Bridges,* Assistant Attorneys General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed. *Johnson* v. *Virginia,* 373 U. S. 61.

MR. JUSTICE BLACK concurs in reversal of the judgment of contempt for reasons discussed in *In re Murchison,* 349 U. S. 133, *In re Oliver,* 333 U. S. 257, and *Thompson* v. *City of Louisville,* 362 U. S. 199. Cf. *Offutt* v. *United States,* 348 U. S. 11.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

Syllabus.

UNITED STATES *v.* EL PASO NATURAL GAS CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

No. 94. Argued February 25–26, 1964.—Decided April 6, 1964.

The Federal Government filed suit under § 7 of the Clayton Act charging that the acquisition by a natural gas company, then the sole out-of-state supplier to California, of the stock and assets of another gas company, one of the two major interstate pipelines serving the trans-Rocky Mountain States, which had made some efforts to enter the California market, "may be substantially to lessen competition." The District Court, without a written opinion, dismissed the complaint after trial, adopting verbatim the findings of fact and conclusions of law submitted by counsel for appellees. *Held:*

1. A trial judge's findings will stand if supported by evidence even where they are not his own work product, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, but such findings are less helpful on judicial review than those prepared by the trial judge himself. Pp. 656–657.

2. A review of the record, composed mainly of undisputed evidence, clearly shows that the "effect of such acquisition may be substantially to lessen competition" in California under § 7 of the Act. Pp. 657–662.

(a) The production, transportation and sale of natural gas is a "line of commerce" and California is a "section of the country," as used in § 7. P. 657.

(b) The words "may be substantially to lessen competition" in § 7 manifest Congress' concern with probabilities and not with either certainties or ephemeral possibilities. P. 658.

(c) Although the acquired company had not gained entry into California for its gas, its effect as a potential supplier made it a substantial competitive factor in that continuously expanding market. Pp. 658–659.

3. Since appellees have been on notice of the antitrust charge almost from the inception of the merger plans, the District Court is directed to order divestiture without delay. P. 662.

Reversed.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Robert L. Wright, Frank Goodman* and *Robert B. Hummel.*

Gregory A. Harrison argued the cause for appellees. With him on the brief were *Arthur H. Dean, Charles V. Shannon, Atherton Phleger, Roy H. Steyer, Leon M. Payne* and *Dennis McCarthy.*

William M. Bennett filed a brief for the State of California, as *amicus curiae,* urging reversal.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE CLARK.

This is a civil suit charging a violation of § 7 of the Clayton Act,[1] by reason of the acquisition of the stock and assets of Pacific Northwest Pipeline Corp. (Pacific Northwest) by El Paso Natural Gas Co. (El Paso). The District Court dismissed the complaint after trial, making findings of fact and conclusions of law, but not writing an opinion. The case is here on direct appeal. 15 U. S. C. § 29. We noted probable jurisdiction, 373 U. S. 930.

The ultimate issue revolves around the question whether the acquisition substantially lessened competition in the sale of natural gas in California—a market of which El Paso was the sole out-of-state supplier at the time of the acquisition.[2]

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[1] Section 7 of the Clayton Act, 38 Stat. 731, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, 64 Stat. 1125, 15 U. S. C. § 18, provides in relevant part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition *may be substantially to lessen competition,* or to tend to create a monopoly." (Italics added.)

[2] In 1956, El Paso supplied more than 50% of all gas consumed in the State, the remainder coming from intrastate sources.

In 1954, Pacific Northwest received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington, to supply gas to the then unserved Pacific Northwest area. Later it was authorized to receive large quantities of Canadian gas and to enlarge its system for that purpose. In addition, Pacific Northwest acquired Rocky Mountain reservoirs along its route. At the end of 1957 it had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin; 1.59 trillion under contract in the Rocky Mountain area; and 2.33 trillion under contract in Canada—8.47 trillion in all. By 1958 one-half of its natural gas sales were of gas from Canada.

In 1954 Pacific Northwest entered into two gas exchange contracts with El Paso—one to deliver 250 million cubic feet per day to El Paso in Idaho for transportation to California via Nevada, the other to gather gas jointly in the San Juan Basin for a five-year period. Under the latter agreement El Paso loaned gas to Pacific Northwest from its wells in the San Juan Basin; to avoid duplication of facilities, Pacific Northwest agreed to gather gas with its own facilities from El Paso's wells in the eastern portion of the basin, and El Paso agreed to perform the same service for Pacific Northwest in the western portion. At the same time Pacific Northwest undertook to purchase 300 million cubic feet per day from Westcoast Transmission Co., Ltd., a Canadian pipeline.

An executive of Pacific Northwest called these agreements a "treaty" to "solve the major problems which have been confronting us." A letter from Pacific Northwest to its stockholders stated:

> "This tri-party deal will benefit all concerned. It will give Westcoast what they have been fighting for—a pipeline. It will mean that Pacific will ex-

> pand its facilities, be a larger company, will protect its market from future competition by a Canadian pipeline and it caused the dismissal of the law suit of Westcoast against Pacific's present certificate. *It means that El Paso's California market will be protected against future competition,* and further it results in all parties *now working together for a common end rather than fighting each other.*" (Italics added.)

El Paso, however, could not get Commission approval to build the pipeline necessary to deliver the 250 million cubic feet of gas to California. Consequently, a new agreement on that aspect was negotiated in 1955, whereby El Paso undertook to purchase 50 million cubic feet a day to be delivered on an exchange basis in Colorado. Pacific Northwest, still obligated to take 300 million cubic feet per day from Westcoast, disposed of the balance in its own market areas.

Prior to these 1954 and 1955 agreements Pacific Northwest had tried to enter the rapidly expanding California market. It prepared plans regarding the transportation of Canadian gas to California, where it was to be distributed by Pacific Gas & Electric (PGE). That effort—suspended when the 1954 agreements were made—was renewed when the new agreement with El Paso was made in 1955; and the negotiation of the 1955 contract with El Paso was conceived by Pacific Northwest as the occasion for "lifting of all restrictions on the growth of Pacific." In 1956 it indeed engaged in negotiations for the sale of natural gas to Southern California Edison Co. (Edison). The latter, largest industrial user of natural gas in Southern California, used El Paso gas, purchased through a distributor. It had, however, a low priority from that distributor, being on an "interruptible" basis, *i. e.*, subject to interruption during periods of peak demand for domestic uses. Edison wanted a firm con-

tract and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956. The idea was for Pacific Northwest to deliver to Edison at a point on the California-Oregon border 300 million cubic feet of Canadian gas a day. In July 1956 they reached a tentative agreement. Edison thereupon tried to develop within California an integrated system for distributing Canadian gas supplied by Pacific Northwest to itself and others. El Paso decided to fight the plan to the last ditch, and succeeded in getting (through a distributor) a contract for Edison's needs. Edison's tentative agreement with Pacific Northwest was terminated. Before Edison terminated that agreement with Pacific Northwest, Edison had reached an agreement with El Paso for firm deliveries of gas; and while the original El Paso offer was 40¢ per Mcf, the price dropped to 38¢ per Mcf, then to 34¢ and finally to 30¢. Thereafter, and while the merger negotiations were pending, Pacific Northwest renewed its efforts to get its gas into California.

El Paso had been interested in acquiring Pacific Northwest since 1954. The first offer from El Paso was in December 1955—an offer Pacific Northwest rejected. Negotiations were resumed by El Paso in the summer of 1956, while Pacific Northwest was trying to obtain a California outlet. The exchange of El Paso shares for Pacific shares was accepted by Pacific Northwest's directors in November 1956, and by May 1957 El Paso had acquired 99.8% of Pacific Northwest's outstanding stock. In July 1957 the Department of Justice filed its suit charging that the acquisition violated § 7 of the Clayton Act. In August 1957 El Paso applied to the Federal Power Commission for permission to acquire the assets of Pacific Northwest. On December 23, 1959, the Commission approved and the merger was effected on December 31, 1959. In 1962 we set aside the Commission's order, holding that

it should not have acted until the District Court had passed on the Clayton Act issues. *California* v. *Federal Power Comm'n*, 369 U. S. 482. Meanwhile (in October 1960) the United States amended its complaint so as to include the asset acquisition in the charged violation of the Clayton Act.

There was a trial, and after oral argument the judge announced from the bench [3] that judgment would be for appellees and that he would not write an opinion. He told counsel for appellees "Prepare the findings and conclusions and judgment." They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 184–185. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.[4] See 2B Barron

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[3] "The Court. Judgment will be for the defendant in this case. Prepare the findings and conclusions and judgment.

"How much time do you want within which to submit it?

"Mr. Harrison. Does the court have a rule, your Honor?

"The Court. No, I have no rule about that.

"Mr. Harrison. Could we have twenty days, your Honor?

"The Court. Twenty days to prepare the findings and conclusions and judgment. I shan't write an opinion in this case.

"Mr. Harrison. I didn't hear you.

"The Court. I don't intend to write an opinion in this case. I think it is a factual matter. I think we have taken a full, fair look at the evidence and the factual issues, and I am not satisfied that the Government has discharged its burden."

[4] Judge J. Skelly Wright of the Court of Appeals for the District of Columbia recently said:

"Who shall prepare the findings? Rule 52 says the court shall prepare the findings. 'The court shall find the facts specially and

and Holtzoff, Federal Practice and Procedure (Wright ed. 1961), § 1124. Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States* v. *Forness,* 125 F. 2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case. On review of the record—which is composed largely of undisputed evidence—we conclude that "the effect of such acquisition may be substantially to lessen competition" within the meaning of § 7 of the Clayton Act.

There can be no doubt that the production, transportation, and sale of natural gas is a "line of commerce" within the meaning of § 7. There can also be no doubt that California is a "section of the country" as that phrase is used in § 7. The sole question, therefore, is whether on undisputed facts the acquisition had a sufficient tendency to lessen competition or is saved by the findings that Pacific Northwest, as an independent entity, could not have obtained a contract from the California distrib-

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state separately its conclusions of law.' We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

"I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case." Seminars for Newly Appointed United States District Judges (1963), p. 166.

utors, could not have received the gas supplies or financing for a pipeline project to California, or could not have put together a project acceptable to the regulatory agencies. Those findings are irrelevant.

As we said in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 323: "Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." See also *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362.

Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial factor in the California market at the time it was acquired by El Paso. At that time El Paso was the only actual supplier of out-of-state gas to the vast California market, *a market that expands at an estimated annual rate of 200 million cubic feet per day.*[5] At that time Pacific North-

[5] California, in a brief *amicus curiae*, pp. 5–6, tells us:

"The dependence of California upon natural gas as a fuel is unique among the states. California does not possess coal deposits sufficient for energy requirements. It is dependent upon natural gas for its energy needs and approximately three quarters of the natural gas utilized in California comes from out-of-state sources. Ninety per cent of all homes in California are heated by natural gas and California industry depends upon natural gas as a fuel. In California the percentage of total energy provided by natural gas is substantially greater than for the nation as a whole.

"During 1962, California Gas distributing utilities purchased over 745,000,000,000 cubic feet of natural gas at a cost somewhat in excess of $266,850,000. California takes in excess of ten per cent of all of the natural gas moving in interstate commerce throughout the United States and exceeds the volume of gas imported by any other state.

"The interest of California in this proceeding is evident. More than 80 per cent of the customers of El Paso before merger resided in

west was the only other important interstate pipeline west of the Rocky Mountains. Though young, it was prospering and appeared strong enough to warrant a "treaty" with El Paso that protected El Paso's California markets.

Edison's search for a firm supply of natural gas in California, when it had El Paso gas only on an "interruptible" basis, illustrates what effect Pacific Northwest had merely as a potential competitor in the California market. Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions. We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State. We repeat that one purpose of § 7 was "to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger . . . ." *United States* v. *Philadelphia National Bank*, 374 U. S., at 367.

This is not a field where merchants are in a continuous daily struggle to hold old customers and to win new ones over from their rivals. In this regulated industry a natural gas company (unless it has excess capacity) must

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the State of California and California ratepayers bear most of the costs of service of El Paso.

"California, alone, consumes more natural gas than the Middle Atlantic states combined, more than half as much as the highly industrialized, thickly populated East North-Central states of Illinois, Indiana, Michigan, Ohio and Wisconsin, and as much as the seven states that make up the West North-Central areas. Out-of-state deliveries to California averaged three billion cubic feet per day in 1961. At a price of slightly more than thirty cents per thousand cubic feet (Mcf), this business was worth then about $1,000,000 per day."

compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number. For example, in California there are only two significant wholesale purchasers—Pacific Gas & Electric in the north and the Southern Companies in the south. Once the Commission grants authorization to construct facilities or to transport gas in interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas.*

The effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on. Pacific Northwest's position as a competitive factor in California was not disproved by the fact that it had never sold gas there. Nor is it conclusive that Pacific Northwest's attempt to sell to Edison failed. That might be weighty if a market presently saturated showed signs of petering out. But it is irrelevant in a market like California, where incremental needs are booming. That is underscored in the case by a memorandum dated October 18, 1956, which summarized a meeting at which terms of the acquisition were negotiated. It recited that Pacific Northwest had substantially concluded additional contracts for Canadian gas and that "Pacific plans on selling this additional volume of gas to the California market . . . ." On November 5, 1956, just three days prior to approval by the directors of Pacific Northwest of the

stock exchange, it made a firm offer to PGE to supply up to 350 million cubic feet a day for 20 years. Even after that approval and before the actual exchange, the chief executive of Pacific Northwest, writing November 22, 1956, said: "I do not think for the present moment we should confuse the sale of gas from our system to California with El Paso taking part of the gas through their present system to California. Reason for this should the El Paso-Pacific deal collapse we would have nothing of substance with California."

Pacific Northwest had proximity to the California market—550 miles distant in Wyoming, even nearer in Idaho, only 250 miles away in Oregon. Moreover, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and western Canada. Had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position *vis-à-vis* California. No one knows what success it would have had. We do know, however, that two interstate pipelines in addition to El Paso now serve California—one of the newcomers being Pacific Gas Transmission Co., bringing down Canadian gas. So we know that opportunities would have existed for Pacific Northwest had it remained independent.

Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice. Pacific Northwest was no feeble, failing company; [6] nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain States; it had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern, and coveted, by El

[6] Cf. *International Shoe Co.* v. *Federal Trade Comm'n*, 280 U. S. 291.

Paso. If El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field. For normally there is no competition—once the lines are built and the long-term contracts negotiated—except as respects the incremental needs.

Since appellees have been on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger—we not only reverse the judgment below but direct the District Court to order divestiture without delay.[7]

Reversed.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I.

Contrary to what I had first thought, the Government is not asking in this case, as it did in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, that we "in effect . . . try the case *de novo*," *id.*, at 340. Rather it contends that on the undisputed facts of record the ultimate determination below was clearly erroneous. See *id.*, at 341–342. For reasons given in the Court's opinion, I agree that a violation of § 7 of the Clayton Act has been established, and that the District Court erred in deciding otherwise. On this score I shall comment only on two matters.

First. The Court's strictures concerning the District Court's findings seem to me to miss the mark. Findings of fact should, of course, be the product of the conscientious and independent judgment of the district judge. Nevertheless, if they are supported by evidence, they are not rendered suspect simply because the trial court, as

[7] Cf. *Wisconsin* v. *Illinois*, 281 U. S. 179, 197.

here, has accepted *in toto* the findings proposed by one side or the other. The real lack in this case is that the District Court wrote no opinion setting forth the reasoning underlying any of the subsidiary findings on disputed issues of fact or connecting the subsidiary findings with its ultimate determination that the Clayton Act had not been violated by this merger.

Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has foundered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance.

Second. This case affords another example of the unsatisfactoriness of the existing bifurcated system of antitrust and other regulation in various fields. In this case, the Federal Power Commission had indicated its approval of this merger as being in the public interest. The Department of Justice, however, considered the merger to be violative of the antitrust laws and, for that reason alone, against the public interest. This Court, under the present scheme of things has no choice on this record* but to sustain the position of the Department of Justice, as indeed it has felt constrained to do, albeit in my view with less justification, in other recent cases involving dual regulation. Cf. *United States* v. *Philadelphia National Bank*, 374 U. S. 321; *United States* v. *First National Bank & Trust Co.*, decided today, *post*, p. 665, and my dissenting opinions in those cases. It would be unrealistic not to recognize that this state of affairs has

*This Court has not had the benefit of an *amicus* brief from the Federal Power Commission.

the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere.

It does seem to me that the time has come when this duplicative and, I venture to say, anachronistic system of dual regulation should be re-examined. Had the subtle and necessarily speculative questions involved in assessing the short-term and long-term effects of this merger been subject to appraisal by a single agency, under congressionally established standards marking the relationship between the different and often competing objectives of the antitrust laws and those governing the regulation of "interstate" natural gas, who can say that this case might not have called for a different outcome?

II.

While I agree with the Court's decision on the merits, I dissent from its peremptory ordering of divestiture. "The framing of" appropriate relief "should take place in the District rather than in Appellate Courts." *International Salt Co., Inc.*, v. *United States*, 332 U. S. 392, 400 (footnote omitted). *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, is not to the contrary; that case had already been here before on the merits (353 U. S. 586), and when it came here again at the relief stage the Court observed that "the District Courts [have] the responsibility *initially* to fashion the remedy . . . ." 366 U. S., at 323. I know of no case where this Court has in the first instance itself directed divestiture or any other particular kind of relief. The fact that these appellees have been "on notice," *ante*, p. 662, of the charges against them affords no justification for this departure from normal practice. See the cases cited in the second *du Pont* case, 366 U. S., at 322.

I would remand the case to the District Court for the fashioning of appropriate relief.

Syllabus.

UNITED STATES *v.* FIRST NATIONAL BANK & TRUST CO. OF LEXINGTON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 36. Argued March 4–5, 1964.—Decided April 6, 1964.

In this civil action the United States, the appellant, charges that the consolidation of the largest and fourth largest of the six commercial banks in Fayette County, Kentucky, violates §§ 1 and 2 of the Sherman Act. The Comptroller of the Currency had approved the consolidation although reports, required by the Bank Merger Act of 1960, from the Attorney General, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System all concluded that it would adversely affect competition in the area. Although recognizing that approval by the Comptroller of the Currency did not immunize the consolidation from the operation of the Act, the District Court found that no violation was shown. *Held:* The consolidation of the appellee banks constitutes a violation of § 1 of the Sherman Act. Pp. 666–673.

(a) Commercial banking is one relevant product market in which to judge the effect of the consolidation on competition. Pp. 666–668.

(b) The consolidation should be judged by its effect on competition in Fayette County, the geographical market. P. 668.

(c) The new bank controls over half of the relevant market and by its disparity of size, as attested by three of the four remaining banks, will seriously affect their long-range ability to compete, despite the absence of any "predatory" purpose. P. 669.

(d) The elimination of significant competition between the parties to the consolidation, which were major competitive factors in the relevant market, of itself constitutes an unreasonable restraint of trade in violation of § 1 of the Act. *Northern Securities Co.* v. *United States,* 193 U. S. 197, followed; *United States* v. *Columbia Steel Co.,* 334 U. S. 495, distinguished. Pp. 669–673.

208 F. Supp. 457, reversed.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Larry L. Williams, Melvin Spaeth* and *Richard J. Wertheimer.*

Robert M. Odear argued the cause for appellees. With him on the brief were *Gladney Harville, Rufus Lisle* and *Clinton M. Harbison.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

This is a civil suit in which the United States charges that the consolidation of First National Bank and Trust Co. of Lexington, Kentucky (First National), and Security Trust Co. of Lexington (Security Trust), to form First Security National Bank and Trust Co. (First Security), constitutes a combination in restraint of trade and commerce in violation of § 1 of the Sherman Act and a combination and an attempt to monopolize trade and commerce in violation of § 2 of that Act.[1] 26 Stat. 209 as amended, 15 U. S. C. §§ 1, 2.

The plan of consolidation was submitted to the Comptroller of the Currency and he, pursuant to the provision of the Bank Merger Act of 1960, 74 Stat. 129, 12 U. S. C. (Supp. IV) § 1828 (c), requested and received reports of the probable competitive effects of the proposed consoli-

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[1] Sections 1 and 2 of the Sherman Act provide in pertinent part:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

dation from the Attorney General, the Federal Deposit Insurance Corp., and the Board of Governors of the Federal Reserve System. Each report concluded that the consolidation would adversely affect competition among commercial banks in Fayette County. Nevertheless, the Comptroller of the Currency approved the consolidation on February 27, 1961; it was effected March 1, and this Sherman Act suit was filed the same day. The District Court, while agreeing that the Comptroller of the Currency's approval of the consolidation did not render it immune from challenge under the Sherman Act,[2] held that no violation of that Act had been shown. 208 F. Supp. 457. The case is here on direct appeal. 15 U. S. C. § 29. We noted probable jurisdiction. 374 U. S. 824.

We agree with the District Court that commercial banking is one relevant market[3] for determining the § 1 issue in the case. In Fayette County commercial banks are the only financial institutions authorized to receive demand deposits and to offer checking accounts. They are also the only financial institutions in the county that accept time deposits from partnerships and corporations and that make single-payment loans to individuals[4] and commercial and industrial loans to businesses. Moreover, commercial banks offer a wider variety of financial services than the other financial institutions, *e. g.*, deposit

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[2] That issue was put to rest by *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–355.

[3] In view of our disposition of the case we find it unnecessary to determine whether trust department services alone are another relevant market.

[4] Small loan companies make personal loans of $800 or less at interest rates higher than those charged by commercial banks. Since commercial banks carry a large volume of demand deposits, their real estate loans are generally of a shorter duration than those offered by savings and loan associations or insurance companies.

boxes, Christmas Clubs, correspondent bank facilities, collection services, and trust department services.

We also agree with the District Court that the consolidation should be judged in light of its effect on competition in Fayette County.[5] The record establishes that here, as in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, the "factor of inconvenience" does indeed localize banking competition "as effectively as high transportation costs in other industries." 374 U. S., at 358. Practically all of the business of the banks in Lexington originates in Fayette County. Only 4.8% of First National's demand deposit accounts and 4.5% of Security Trust's were held by depositors who did not maintain offices in Lexington. In dollar volume the percentage was 2.8 for each bank. Apart from large national companies, businesses in the area are restricted to the Fayette County banks for their working capital loans; and commercial banks outside Lexington do a negligible amount of business in the county. There is also a negligible amount of competition from corporate fiduciaries outside Fayette County.

We turn then to the facts relevant to the alleged restraint of trade under the Sherman Act.

Prior to the consolidation the relative size of First National as compared to its five competitors was as follows:

	Assets	*Deposits*	*Loans*
First National	39.83%	40.06%	40.22%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.99	13.32	14.46
Security Trust	12.87	11.88	13.98
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

[5] The Federal Deposit Insurance Corp. and the Federal Reserve Board used Fayette County as the geographical market, the latter saying that "since there are no concentrations of population in other

The bank established by the consolidation was larger than all the remaining banks combined:

	Assets	*Deposits*	*Loans*
First Security	52.70%	51.95%	54.20%
Citizens Union	17.06	16.78	16.41
Bank of Commerce	12.99	13.32	14.46
Central Bank	9.14	9.66	8.85
Second National	8.10	8.30	6.09

Prior to the consolidation, First National and Security Trust had been close competitors in the trust department business. Between them they held 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts:

	Trust Assets	*Trust Dept. Earnings*	*Number of Trust Accounts*
Security Trust	50.55%	46.91%	54.31%
First National	44.27	45.29	25.31
Citizens Union	3.41	4.21	16.01
Second National	1.33	.63	2.12
Bank of Commerce	.44	2.96	2.26

There was here no "predatory" purpose. But we think it clear that significant competition will be eliminated by the consolidation. There is testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years; that the "image" of "bigness" is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.

We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade in viola-

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counties close enough to create competition with other banks, the competitive effects of the proposed consolidation would be confined to the Lexington banks."

tion of § 1 of the Sherman Act. The case, we think, is governed by *Northern Securities Co.* v. *United States*, 193 U. S. 197, and its progeny. The Northern Pacific and the Great Northern operated parallel lines west of Chicago. A holding company acquired the controlling stock in each company. A violation of § 1 was adjudged without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it. *Id.*, at 326–328.

United States v. *Union Pacific R. Co.*, 226 U. S. 61, was in the same tradition. Acquisition by Union Pacific of a controlling stock interest in Southern Pacific was held to violate § 1 of the Sherman Act. As in the *Northern Securities* case the Court held the combination illegal because of the elimination of the *inter se* competition between the merging companies, without reference to the strength or weakness of whatever competition remained. The Court said:

> "It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control.

> It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected." *Id.*, at 88–89.

United States v. *Reading Co.*, 253 U. S. 26, is the third of the series. There a holding company brought under common control two competing interstate carriers and two competing coal companies. That was held "without more" to be a violation of §§ 1 and 2 of the Sherman Act. *Id.*, at 59.

The fourth of the series is *United States* v. *Southern Pacific Co.*, 259 U. S. 214, in which the acquisition by Southern Pacific of stock of Central Pacific—a connecting link for transcontinental shipments by a competitor of Southern Pacific—was held to violate the Sherman Act. In reference to the earlier cases [6] the Court said:

> "These cases, collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." *Id.*, at 230–231.

We need not go so far here as we went in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225, where we said:

> ". . . the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected."

The four railroad cases at least stand for the proposition that where merging companies are major competitive

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[6] Two of which had been decided after *Standard Oil Co.* v. *United States*, 221 U. S. 1, which announced "the rule of reason."

factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act. That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.

It is said that *United States* v. *Columbia Steel Co.*, 334 U. S. 495, is counter to this view. There the United States Steel Corp. acquired the assets of Consolidated Steel Corp. Both made fabricated structural steel products, the former selling on a nation-wide basis, the latter in 11 States. The conclusion that the acquisition was lawful was reached after the Court observed, *inter alia*, that because of rate structures and the location of United States Steel's fabricating subsidiaries, the latter were unable to compete effectively in Consolidated's market. *Id.*, at 511–518, 529–530. The *Columbia Steel* case must be confined to its special facts. The Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.*, at 527–528.

In the present case all those factors clearly point the other way, as we have seen. Where, as here, the

merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act. In view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2.

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agree with the Court that the elimination of competition between the two banks in the circumstances here presented was a violation of § 1 of the Sherman Act. They would rest the reversal, however, solely on the conclusion that the factors relied on in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527–528, quoted by the Court, as applied to the facts of this case, clearly compel the reversal.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

But for the Court's return to a discarded theory of antitrust law, this case would have little future importance. The decision last Term in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, that § 7 of the Clayton Act, 15 U. S. C. § 18, is applicable to bank mergers surely marks the end of cases like this one, in which the Government relies solely on §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2. Since, however, this case, doomed to be a novelty in the reports, has become the vehicle for turning the clock back to antitrust law of days long past, I am constrained to do more than merely register my dissent.

I.

Stripped of embellishments, the Court's opinion amounts to an invocation of formulas of antitrust numerology and a presumption that in the antitrust field good

things come usually, if not always, in small packages.[1] The "facts relevant to the alleged restraint of trade under the Sherman Act," *ante*, p. 668, on which the Court relies, are: (1) the size relative to their competitors of First National and Security Trust before the consolidation and of First Security after the consolidation; (2) the competitive position before the consolidation of First National and Security Trust in the more limited area of trust business;[2] and (3) "testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years . . . ," *ante*, p. 669.

The testimony to which the Court adverts was provided by competitors of First Security and was characterized by the district judge who heard it as seemingly "based merely upon surmise and . . . lacking in factual support." 208 F. Supp. 457, 460. Since the Court suggests no reason for regarding this evidentiary finding of the trial court as "clearly erroneous," it must be accepted here, *e. g., United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341–342, leaving as the factual basis for the Court's decision only the statistics unquestionably showing that First National and Security Trust were big and First Security is bigger. The embellishment which adorns these statistics is the proposition that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by

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[1] Compare the dissenting opinion in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 534.

[2] The reason for singling out this aspect of the banks' activities is unclear, since the Court does not determine even whether trust department services should be regarded as a relevant market. See *ante*, p. 667, note 3. In view of the majority's disposition of the case, I do not set out here my reasons for believing that the District Court's determination that the consolidation in question does not violate § 2 of the Sherman Act (monopoly) should be affirmed.

merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act," *ante*, pp. 671–672.

The sole support for this proposition, which is defended by no independent reasoning whatever, is the four "railroad cases," a reiteration of which forms the bulk of the Court's opinion.[3] It is questionable whether those cases, three of which involved the combination of massive transportation systems [4] and the fourth a combination of "two great competing interstate carriers and . . . two great competing coal companies extensively engaged in interstate commerce" [5] have any relevance to the present factual situation. That question, however, need not be explored.

In *United States* v. *Columbia Steel Co.*, 334 U. S. 495, these same cases were cited by the Government for the same proposition urged here: that "control by one competitor over another violates the Sherman Act . . . ," *id.*, at 531. The Court relegated the cases to a footnote and stated that it would not "examine those cases to determine whether we would now approve either their language or their holdings." *Ibid.* The facts of the "railroad cases" were found to be "so dissimilar from that presented" that they could "furnish little guidance" in deciding the later case. *Ibid.* Beyond this explicit rejection of these cases as a basis for decision is their further rejection clearly implicit in the portion of the *Columbia Steel* opinion which the Court quotes, *ante*, p. 672.

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the

[3] *United States* v. *Yellow Cab Co.*, 332 U. S. 218, cited by the Court, *ante*, p. 671, is wholly irrelevant.

[4] *Northern Securities Co.* v. *United States*, 193 U. S. 197; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

[5] *United States* v. *Reading Co.*, 253 U. S. 26, 59.

> percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." 334 U. S., at 527.

Quite obviously, if "bigness" alone provided a sufficient answer to the questions involved in a § 1 charge, it would be pointless to attend to the factors set out in *Columbia Steel* and reiterated here, in form approvingly but in fact without regard.

II.

If regard be had to the criteria enumerated in *Columbia Steel*, none of them except perhaps those which deal with "bigness" favor the Government here. Although for purposes of the Sherman Act, such statistics have little meaning in the absence of a context,[6] it may be admitted that the figures in this case of *dollar volume*[7] and the *percentage of business controlled* are large. So far as these figures have relevance under the *Columbia Steel* test, they perhaps speak against the appellee.

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[6] The presumption which the Court laid down in *Philadelphia National Bank, supra*, at 363, that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is . . . inherently likely to lessen competition substantially . . ." was concerned with the application of § 7 of the Clayton Act. Compare *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 612, a Sherman Act case in which the Court noted that "no magic inheres in numbers," and quoted with approval the statement in *Columbia Steel, supra*, at 528, that "the relative effect of percentage command of a market varies with the setting in which that factor is placed."

[7] As found by the District Court, in 1960, First National had "total assets of $65,069,000, total deposits of $58,673,000 and total net loans and discounts of $35,434,000." 208 F. Supp., at 459. Security Trust, in 1960, had "total assets of $21,033,000, total deposits of $17,402,000 and total net loans and discounts of $12,317,000." *Ibid.*

On the other hand, the *strength of the remaining competition* is attested by findings of fact in the District Court, not refuted or even mentioned in the Court's opinion:

> "As of December 31, 1960, there were in operation in Lexington, beside the First National Bank and Trust Company and Security Trust Company, four other commercial banks, namely:
>
> "Citizens Union National Bank and Trust Company, with total assets of $27,876,000, total deposits of $24,569,000 and total net loans and discounts of $14,457,000;
>
> "Bank of Commerce, with total assets of $21,230,000, total deposits of $19,500,000 and total net loans and discounts of $12,738,000;
>
> "Central Bank and Trust Company, with total assets of $14,930,000, with total deposits of $14,144,000, and with total net loans and discounts of $7,799,000;
>
> "Second National Bank and Trust Company, with total assets of $13,240,000, total deposits of $12,157,000 and total net loans and discounts of $5,362,000.
>
> . . . . .
>
> "Before and since the consolidation herein referred to, all the banks in Fayette County have been operated successfully in the field of commercial banking and in competition with each other.
>
> . . . . .
>
> "In the trial of the case, other than the officials and employees of the defendant, First Security National Bank and Trust Company, numerous witnesses, most of whom were men of long experience in the field of banking, testified to the effect that, in their opinion, the consolidation of the two Lexington banks herein referred to would not lessen

competition in the banking field in Fayette County and did not tend to create a monopoly in that field.

"According to their testimony, the fact that the merged bank had a large percentage of the trust business of the community did not and would not substantially restrain or lessen competition in the field of commercial banking." 208 F. Supp., at 459–460.[8]

The *motive* behind the consolidation also is indicated by the findings below, similarly unchallenged, that ". . . the consolidation herein referred to clearly appears to have been the result of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking." 208 F. Supp., at 460. Any doubts on this score are removed by the explicit concession of government counsel at oral argument before this Court that there is no evidence at all in the record of an anticompetitive motive behind the consolidation.

There is nothing whatever in the findings below or in the opinion of this Court pertinent to the other criteria laid down in *Columbia Steel*—the probable development of the industry, consumer demands, and other market characteristics—which supports the Court's conclusion.[9]

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[8] The only contrary evidence, testimony of presidents of three of the four competing local banks who "expressed considerable fear that the consolidation would result in serious loss to the other banks and would be disastrous to some of them," 208 F. Supp., at 460, was discredited by the District Court. See *supra*, p. 674.

[9] With reference to the probable development of the industry, the Government turns to the past and notes that the number of local banks decreased from 10 to 7 between 1929 and 1938; but this statistic, more at home in a Clayton Act case, is of doubtful significance in the present context, particularly in view of the period during which the decrease occurred. The same may be said of the Government's reference to the testimony of the president of a competing bank that the consolidation from which his bank resulted was carried

In sum, the Court's analysis of the facts of this case ends where it begins; the conclusion that the consolidation violates the Sherman Act collapses into the agreed premise that First Security is "big."

III.

The truth is, of course, that this is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act. One can hardly doubt that it comes to us under these false colors only because the decision last Term that bank mergers could be reached under the Clayton Act was indeed a surprise to the Government. See my dissenting opinion in *Philadelphia National Bank, supra,* at 373. No one has more sympathy for the Government in this respect than I. Nevertheless, having "at the outset elected to proceed not under the Clayton but the Sherman Act," *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 609, "the Government here must measure up to the criteria of the more stringent law," *id.,* at 610.

The pernicious effect of allowing the Government to change horses in midstream in fact if not quite in form [10] goes beyond this case and, in the field of banking, beyond even the revitalization of a properly moribund rule of antitrust law. In combination with the *Philadelphia National Bank* case, today's decision effectively precludes any possibility that the will of the Congress with respect to bank mergers will be carried out. The Congress has plainly indicated that it does not intend that mergers in

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through (years before the First Security consolidation) principally to enable it "to better compete with the First National." In fact, in the three years since the First Security consolidation, there has been no further concentration.

[10] It is one thing to say, as the Court did in *Times-Picayune, supra,* at 609, that "the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve . . . ." It is quite another thing to treat them as interchangeable. See *id.,* at 609-610.

the banking field be measured solely by the antitrust considerations which are applied in other industries. Characteristic of such indications, set out in detail in my dissenting opinion in the *Philadelphia National Bank* case, *supra*, at 374–386, is the following excerpt from the Senate Report on the bill which became the Bank Merger Act of 1960, 12 U. S. C. (Supp. IV, 1963) § 1828 (c):

> "The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision." S. Rep. No. 196, 86th Cong., 1st Sess., 24.

Adherence to the principles enunciated in *Columbia Steel, supra*, would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress. It is difficult to see how features peculiar to banking or indeed any other features of a particular case which, in reason, should lead to a different result, can stand up against the bludgeon with which the Court now strikes at combinations which may well have no fault except "bigness."

I would affirm.

Syllabus.

UNITED STATES *v.* BARNETT ET AL.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 107. Argued October 21–22, 1963.—Decided April 6, 1964.

This proceeding arose from the efforts of a Negro to gain admission as a student to the University of Mississippi. The Court of Appeals, *sua sponte*, appointed the Attorney General or his assistants to prosecute this criminal contempt proceeding under Rule 42 (b) of the Federal Rules of Criminal Procedure against the Governor and Lieutenant Governor of Mississippi for disobeying injunctive orders issued by the Court of Appeals and the District Court. The alleged contemners demanded trial by jury and the Court of Appeals, being evenly divided, certified to this Court the question whether they were so entitled. *Held:* The alleged contemners are not entitled to a jury trial.

1. On the facts certified, there is no statutory right to trial by jury. Pp. 690–692.

(a) 18 U. S. C. §§ 402 and 3691, which provide for jury trial in certain instances of criminal contempt, do not apply since this case involves a contempt committed in disobedience of an order of the Court of Appeals. Pp. 690–692.

(b) It would be anomalous for a court of appeals to have the power to punish contempt of its own orders without a jury, but to be rendered impotent to do so when the offensive behavior happens to be in contempt of a district court order as well. P. 692.

2. On the facts certified, there is no constitutional right to trial by jury. Pp. 692–700.

Reported below: 330 F. 2d 369.

Solicitor General Cox and *Leon Jaworski* argued the cause for the United States. With them on the brief were *Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene* and *David Rubin.*

Malcolm B. Montgomery and *Charles Clark,* Special Assistant Attorneys General of Mississippi, argued the cause for defendants. With them on the brief were

Joe T. Patterson, Attorney General, *Dugas Shands*, Assistant Attorney General, and *Garner W. Green, Joshua Green, M. M. Roberts* and *Fred B. Smith*, Special Assistant Attorneys General.

Briefs of *amici curiae* in support of the defendants were filed by *Joe T. Patterson*, Attorney General of Mississippi, for the State of Mississippi, and by *Osmond K. Fraenkel, Norman Dorsen* and *Melvin L. Wulf* for the American Civil Liberties Union.

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding in criminal contempt was commenced by the United States upon the specific order, *sua sponte*, of the Court of Appeals for the Fifth Circuit. Ross R. Barnett, Governor of the State of Mississippi at the time this action arose,[1] and Paul B. Johnson, Jr., Lieutenant Governor, stand charged with willfully disobeying certain restraining orders issued, or directed to be entered, by that court. Governor Barnett and Lieutenant Governor Johnson moved to dismiss, demanded a trial by jury and filed motions to sever and to strike various charges. The Court of Appeals, being evenly divided on the question of right to jury trial, has certified the question[2] to this Court under the authority of 28 U. S. C. § 1254 (3). 330 F. 2d 369. We pass only on the jury issue and decide that the

[1] On January 21, 1964, Governor Barnett's term of office expired and Lieutenant Governor Johnson became Governor.

[2] "Where charges of criminal contempt have been initiated in this Court of Appeals against two individuals, asserting that such individuals willfully disobeyed a temporary restraining order of the Court, which order was entered at the request of the United States, acting as amicus curiae pursuant to its appointment by an order of the Court which granted to it, among other rights, the right to initiate proceedings for injunctive relief, and the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress, are such persons entitled, upon their demand, to trial by jury for the criminal contempt with which they are charged?"

alleged contemners are not entitled to a jury as a matter of right.

The proceeding is the aftermath of the efforts of James Meredith, a Negro, to attend the University of Mississippi. Meredith sought admission in 1961 and, upon refusal, filed suit in the United States District Court for the Southern District of Mississippi. That court denied relief, but the Court of Appeals reversed and directed the District Court to grant the relief prayed for. *Meredith* v. *Fair*, 305 F. 2d 343. The mandate was stayed by direction of a single judge of the Court of Appeals, whereupon, on July 27, the Court of Appeals set aside the stay, recalled the mandate, amended and reissued it, including its own injunctive order "enjoining and compelling" the Board of Trustees, officials of the University and all persons having knowledge of the decree to admit Meredith to the school. On the following day the Court of Appeals entered a separate and supplemental "injunctive order" directing the same parties to admit Meredith and to refrain from any act of discrimination relating to his admission or continued attendance. By its terms, this order was to remain in effect "until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of [Meredith] . . . ." After a series of further delays, the District Court entered its injunction on September 13, 1962, directing the members of the Board of Trustees and the officials of the University to register Meredith.

When it became apparent that the decrees might not be honored, the United States applied to the Court of Appeals on September 18 for permission to appear in the Court of Appeals in the case. This application was granted in the following terms:

> "IT IS ORDERED that the United States be designated and authorized to appear and participate as *amicus curiae* in all proceedings in this action before

this Court and by reason of the mandates and orders of this Court of July 27, 28, 1962, and subsequently thereto, also before the District Court for the Southern District of Mississippi to accord each court the benefit of its views and recommendations, with the right to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court, as may be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States."

Meanwhile, the Mississippi Legislature had adopted an emergency measure in an attempt to prevent Meredith from attending the University, but on September 20, upon the Government's application, the enforcement of this Act was enjoined, along with two state court decrees barring Meredith's registration. On the same day Meredith was rebuffed in his efforts to gain admission. Both he and the United States filed motions in contempt in the District Court citing the Chancellor, the Registrar and the Dean of the College of Liberal Arts. After a hearing they were acquitted on the ground that the Board of Trustees had stripped them of all powers to act on Meredith's application and that such powers were in Governor Barnett, as agent of the Board.

The United States then moved in the Court of Appeals for a show-cause order in contempt against the Board of Trustees, based on the order of that court dated July 28. An *en banc* hearing was held at which the Board indicated that it was ready to admit Meredith, and on September 24 the court entered an order requiring the Board to revoke its action appointing Governor Barnett to act as its agent. The order also required the Registrar, Robert B. Ellis, to be available on September 25 to admit Meredith.

On the evening of September 24, the United States filed an ancillary action to the *Meredith* v. *Fair* litigation seeking a temporary restraining order against the State of Mississippi, Governor Barnett, the Attorney General of Mississippi, the Commissioner of Public Safety and various lesser officials. This application specifically alleged that the Governor had implemented the State's policy of massive resistance to the court's orders, by personal action, as well as by use of the State's various agencies, to frustrate and destroy the same; that the Governor's action would result in immediate and irreparable injury to the United States, consisting of impairment of the integrity of its judicial processes, obstruction of the administration of justice and deprivation of Meredith's declared rights under the Constitution and laws of the United States. On the basis of such allegations and at the specific instance of the United States as the sole moving party and on its own behalf, the Court of Appeals issued a temporary restraining order at 8:30 a. m. on the 25th against each of these parties restraining them from performing specific acts set out therein and from interfering with or obstructing by any means its order of July 28 and that of the District Court of September 13. Thereafter the United States filed a verified application showing that on the afternoon of the 25th Governor Barnett, "having actual knowledge of . . . [the temporary restraining order], deliberately prevented James H. Meredith from entering the office of the Board of Trustees . . . at a time when James H. Meredith was seeking to appear before Robert B. Ellis in order to register . . . and that by such conduct Ross R. Barnett did wilfully interfere with and obstruct James H. Meredith in the enjoyment of his rights under this Court's order of July 28, 1962 . . . all in violation of the terms of the temporary restraining order entered by the Court this day." The court then entered a show-cause order in contempt against Governor Barnett requiring him to appear on Sep-

tember 28. On September 26, a similar order was issued against Lieutenant Governor Johnson requiring him to appear on September 29. On September 28, the Court of Appeals, *en banc* and after a hearing, found the Governor in civil contempt and directed that he be placed in the custody of the Attorney General and pay a fine of $10,000 for each day of his recalcitrance, unless he purged himself by October 2. On the next day Lieutenant Governor Johnson was found in contempt by a panel of the court and a similar order was entered with a fine of $5,000 a day.

On September 30, President Kennedy issued a proclamation commanding all persons engaged in the obstruction of the laws and the orders of the courts to "cease and desist therefrom and to disperse and retire peaceably forthwith." 76 Stat. 1506. The President also issued an Executive Order dispatching a force of United States Marshals and a detachment of the armed forces to enforce the court's orders. On September 30, Meredith, accompanied by the Marshals, was moved into a dormitory on the University campus and was registered the next day. Although rioting broke out, order was soon restored, with some casualties, and Meredith carried on his studies under continuous guard until his graduation.

On November 15, 1962, the Court of Appeals, *sua sponte*, appointed the Attorney General or his designated assistants to prosecute this criminal contempt proceeding against the Governor and Lieutenant Governor pursuant to Rule 42 (b) of the Federal Rules of Criminal Procedure. On application of the Attorney General, the Court of Appeals issued a show-cause order in criminal contempt based on the Court of Appeals' temporary restraining order of September 25, its injunctive order of July 28, and the District Court's order of September 13. It is out of this proceeding that the certified question arises.

As we have said, the sole issue before us is whether the alleged contemners are entitled as a matter of right to a

jury trial on the charges. We consider this issue without prejudice to any other contentions that have been interposed in the case and without any indication as to their merits.

I.

The First Congress in the Judiciary Act of 1789 conferred on federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." 1 Stat. 83. It is undisputed that this Act gave federal courts the discretionary power to punish for contempt as that power was known to the common law. *In re Savin*, 131 U. S. 267, 275–276 (1889). In 1831, after the unsuccessful impeachment proceedings against Judge Peck,[3] the Congress restricted the power of federal courts to inflict summary punishment for contempt to misbehavior "in the presence of the said courts, or so near thereto as to obstruct the administration of justice," misbehavior of court officers in official matters, and disobedience or resistance by any person to any lawful writ, process, order, rule, decree, or command of the courts. Act of March 2, 1831, c. 99, 4 Stat. 487, 488. These provisions are now codified in 18 U. S. C. § 401 without material difference.[4] The Court of Appeals proceeded in this case under the authority of this section.

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[3] See Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 423–430.

[4] 18 U. S. C. § 401:

"Power of court.

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The alleged contemners claim, however, that the powers granted federal courts under § 401 were limited by the Congress in 1914 by the provisions of §§ 21, 22 and 24 of the Clayton Act, 38 Stat. 738–740, now codified as 18 U. S. C. §§ 402 and 3691. These sections guarantee the right to a jury trial in contempt proceedings arising out of disobedience to orders "of any district court of the United States or any court of the District of Columbia," provided that the conduct complained of also constitutes a criminal offense under the laws of the United States or of any State. But the Clayton Act further provides that the requirement of a jury does not apply to "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." 18 U. S. C. § 402. Rule 42 (b) of the Federal Rules of Criminal Procedure thereafter set down the procedural requirements for all contempt actions, providing that "[t]he defendant is entitled to a trial by jury in any case in which an act of Congress so provides."

We now proceed to a consideration of the claim of a right to trial by jury under these statutes and under the Constitution of the United States.

II.

Governor Barnett and Lieutenant Governor Johnson first contend that the record clearly shows that the United States invoked the proceedings taken by the Court of Appeals and sought that court out as a source of orders, duplicating the orders obtained by the real party in interest in the District Court, solely for the purpose of by-passing the District Court and depriving them of their right to a jury. We find no evidence of this. Indeed,

the Court of Appeals granted injunctive relief only after it had jurisdiction over Meredith's appeal, after it had acted upon that appeal and after its order was being frustrated.

Next it is contended that the Court of Appeals had no jurisdiction in the matter since its mandate had been issued and the case had been remanded to the District Court.[5] On a certificate we do not pass on alleged irregularities in the proceedings in the court below, as such contentions are clearly premature.[6]

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[5] In *Busby* v. *Electric Utilities Employees Union,* 323 U. S. 72, 75 (1944), we held that: "This Court will not answer a question which will not arise in the pending controversy unless another issue, *not yet resolved* by the certifying court, is decided in a particular way." (Emphasis supplied.) In the instant case the issue of right to jury trial is not simply a hypothetical and was squarely presented to the Court of Appeals after that court rejected, in the order of October 19, 1962, the contention that it lacked jurisdiction. While this Court denied the petition for writ of certiorari to review that order, *Mississippi* v. *Meredith,* 372 U. S. 916 (1963), and while the issue is not before us now, the Court would not be foreclosed from passing on the jurisdictional question if and when it is properly presented here after the trial on the merits.

[6] Interpreting the precursor of 28 U. S. C. § 1254 (3), this Court said in *Ward* v. *Chamberlain,* 2 Black 430, 434–435 (December Term, 1862): "Such certificate, as has repeatedly been held by this Court, brings nothing before this Court for its consideration but the points or questions certified, as required by the 6th section of the act. . . . [N]othing can come before this Court, under that provision, except such single definite questions as shall actually arise and become the subject of disagreement in the Court below, and be duly certified here for decision. *Ogle* vs. *Lee,* (2 Cran., 33); *Perkins* vs. *Hart's Exr.,* (11 Whea., 237); *Kennedy et al.* vs. *Georgia State Bank,* (8 How., p. 611.) All suggestions, therefore, respecting any supposed informality in the decree, or irregularities in the proceedings of the suit, are obviously premature and out of place, and may well be dismissed without further remark; because no such inquiries are involved in the points certified, and by all the decisions of this Court matters not so certified are not before the Court for its consideration, but

The alleged contemners next assert that § 402 is applicable. They urge that since § 402 gives a jury trial to those charged with contempt in "any court of the District of Columbia," this would include the Court of Appeals for the District of Columbia. They argue from this that the section must be construed to apply to all other Courts of Appeals to avoid manifest discrimination which the Due Process Clause of the Fifth Amendment prohibits and to comply with the Privileges and Immunities Clause of Art. IV, § 2 of the Constitution. We are not persuaded. At the time that the Clayton Act was adopted, the trial court of general jurisdiction in the District of Columbia was known as the "Supreme Court of the District of Columbia" rather than the United States District Court. Moreover, there were also inferior courts there known as the municipal and police courts and now called the "District of Columbia Court of General Sessions." Since none of these trial courts of the District would have been included in the designation "any district court of the United States," the insertion of "any court of the District of Columbia" was necessary to adapt the bill to the judicial nomenclature of the District of Columbia. It is hardly possible to suppose that the House, where this phrase was inserted without explanation, was somehow by this language reversing the decision to exclude appellate courts from the jury requirements.[7]

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remain in the Court below to be determined by the Circuit Judges. *Wayman* vs. *Southard,* (10 Whea., 21); *Saunders* vs. *Gould,* (4 Pet., 392.)"

[7] This is buttressed by an earlier statement of the sponsor of the bill at 48 Cong. Rec. 8778:

"The next criticism [of the former, rejected bill] was that it provided for contempt in courts where there were no jurors. We answered that by confining the operation in this bill to the circuit courts, to the courts where there are juries, and we exempt its operation in the courts of appellate jurisdiction. We met that criticism in that way. There has been none that I know of or little, if any, complaint made

This is shown by the legislative history of the bill when discussed in the Senate, 51 Cong. Rec. 14414, where it was made explicit that the bill "applies . . . only to orders of the district courts; contempts of orders of all other courts must be had as now."

Nor can we conclude from the record here that the show-cause order directed by the Court of Appeals to the alleged contemners must be construed as being founded upon violations of the District Court's injunction of September 13, entered upon the specific order of the Court of Appeals. The show-cause order specifies that three injunctions were violated, *i. e.*, the original one of the Court of Appeals of July 28 directing Meredith's admission; the District Court's aforesaid order of September 13 which generally embodied the same terms; and the injunction of September 25 directed at the alleged contemners. The claim is, first, that the District Court's order of September 13 superseded the earlier Court of Appeals order of July 28, and that the September 25 order of the Court of Appeals was without significance since it added nothing to the earlier orders except to specifically name the alleged contemners. But it can hardly be said that there was a supersession, since the July 28 order specifically retained jurisdiction. Nor is the September 25 order of no significance, as it is the principal order upon which the alleged contemners' contemptuous conduct is predicated. Moreover, it may be that on trial

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against abuse of the process of contempt by appellate courts. It has been in the district courts, in the circuit courts, in the courts of first instance, where this abuse has occurred, and this bill limits it in effect to the operation of those courts of the first instance where the abuses have occurred and do now occur."

See also statements by two members of the House Judiciary Committee, Representative Floyd at 48 Cong. Rec. 8780 and Representative Davis at 48 Cong. Rec. App. 314. See also, S. Rep. No. 698, 63d Cong., 2d Sess., p. 18.

the Court of Appeals will limit the charge to its own orders. Secondly, it is said that, since the contempt motion includes an order of the District Court, the requirements of §§ 402 and 3691 make a jury necessary. It would be anomalous for a Court of Appeals to have the power to punish contempt of its own orders without a jury, but to be rendered impotent to do so when the offensive behavior happens to be in contempt of a District Court order as well. We are unable to attribute to Congress an intent to award favored treatment to a person who is contemptuous of two or three orders instead of only one.[8]

III.

Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial.[9] This claim has been made and rejected here again and again. Only six years ago we held a full review of the issue in *Green* v. *United States*, 356 U. S. 165 (1958). We held there that "[t]he statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right." At 183. Nor can it be said with accuracy that these cases were based upon historical error. It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters. There were, of course, statutes enacted

[8] Our disposition of the certified question makes it unnecessary for us to reach the issue whether the orders allegedly violated were "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States," §§ 402, 3691.

[9] U. S. Const., Art. III, § 2, cl. 3; Amend. VI. Contemners also claim under Amendments IX and X.

by some of the Colonies which provided trivial punishment in specific, but limited, instances. Some statutes concerned the contempt powers of only certain courts or minor judicial officers. Others concerned specific offenses such as swearing in the presence of officials or the failure of a witness or juror to answer a summons.

But it cannot be said that these statutes set a standard permitting exercise of the summary contempt power only for offenses classified as trivial. Indeed, the short answer to this contention is the Judiciary Act of 1789 which provided that the courts of the United States shall have power to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." [10] It will be remembered that this legislation was enacted by men familiar with the new Constitution. Madison urged passage of the act in the House and five of the eight members of the Senate Committee which recommended adoption, were also delegates to the Constitutional Convention of 1787. 1 Annals of Congress 18, 812–813. It is also asserted that a limitation upon the summary contempt power is to be inferred from the fact that subsequent statutes of some of the States had limitation provisions on punishment for contempts. But our inquiry concerns the standard prevailing at the time of the adoption of the Constitution, not a score or more years later. Finally, early cases have been ferreted out, but not one federal case has been found to support the theory that courts, in the exercise of their summary contempt powers, were limited to trivial offenses.[11] On the contrary, an

[10] 1 Stat. 83.

[11] Statutes and cases dealing with limitations on summary power to punish for contempt in the original 13 States have been compiled in an Appendix, which follows this opinion.

1801 opinion in the case of *United States* v. *Duane*, 25 Fed. Cas. 920, No. 14,997, had this significant language:

> "But though the court have power to punish at discretion, it is far from their inclination to crush you, *by an oppressive fine, or lasting imprisonment.* [Emphasis supplied.] They hope and believe offences of this kind will be prevented in future by a general conviction of their destructive tendency, and by an assurance that the court possess both the power and the resolution to punish them." At 922.

Following this holding we have at least 50 cases of this Court that support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense. We list these in the margin.[12] It

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[12] *United States* v. *Hudson & Goodwin*, 7 Cranch 32 (1812); *Anderson* v. *Dunn*, 6 Wheat. 204 (1821); *Ex parte Kearney*, 7 Wheat. 38 (1822); *Ex parte Robinson*, 19 Wall. 505 (October Term, 1873); *New Orleans* v. *Steamship Co.*, 20 Wall. 387 (October Term, 1874); *In re Chiles*, 22 Wall. 157 (October Term, 1874); *Ex parte Terry*, 128 U. S. 289 (1888); *In re Savin*, 131 U. S. 267 (1889); *In re Cuddy*, 131 U. S. 280 (1889); *Eilenbecker* v. *District Court*, 134 U. S. 31 (1890); *In re Swan*, 150 U. S. 637 (1893); *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447 (1894); *In re Debs*, 158 U. S. 564 (1895); *Brown* v. *Walker*, 161 U. S. 591 (1896); *In re Lennon*, 166 U. S. 548 (1897); *Wilson* v. *North Carolina*, 169 U. S. 586 (1898); *In re Watts and Sachs*, 190 U. S. 1 (1903); *Bessette* v. *Conkey Co.*, 194 U. S. 324 (1904); *Nelson* v. *United States*, 201 U. S. 92 (1906); *United States* v. *Shipp*, 203 U. S. 563 (1906); *Ex parte Young*, 209 U. S. 123 (1908); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911); *Baglin* v. *Cusenier Co.*, 221 U. S. 580 (1911); *Gompers* v. *United States*, 233 U. S. 604 (1914); *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402 (1918); *Ex parte Hudgings*, 249 U. S. 378 (1919); *Blair* v. *United States*, 250 U. S. 273 (1919); *Craig* v. *Hecht*, 263 U. S. 255 (1923); *Michaelson* v. *United States*, 266 U. S. 42 (1924); *Cooke* v. *United States*, 267 U. S. 517 (1925); *McGrain* v. *Daugherty*, 273 U. S. 135, 157 (1927); *Brown* v. *United States*, 276 U. S. 134 (1928); *Sinclair* v. *United States*, 279 U. S. 749 (1929); *Blackmer* v. *United States*, 284 U. S. 421 (1932); *Clark* v. *United States*, 289 U. S. 1 (1933); *Nye* v. *United States*, 313

does appear true that since 1957 the penalties imposed in cases reaching this Court have increased appreciably. But those cases did not settle any constitutional questions as to the punishment imposed.

And with reference to state cases, it is interesting to note that the State of Mississippi has recognized and enforced summary punishment for contempt for over 100 years under the authority of *Watson* v. *Williams*, 36 Miss. 331 (1858), a celebrated case that has been cited with approval in many state jurisdictions as well as in cases of this Court. See *Ex parte Terry*, 128 U. S. 289, 303

U. S. 33 (1941); *Pendergast* v. *United States*, 317 U. S. 412 (1943); *United States* v. *White*, 322 U. S. 694 (1944); *In re Michael*, 326 U. S. 224 (1945); *United States* v. *United Mine Workers*, 330 U. S. 258 (1947); *In re Oliver*, 333 U. S. 257, 274 (1948); *Fisher* v. *Pace*, 336 U. S. 155 (1949); *Rogers* v. *United States*, 340 U. S. 367 (1951); *Hoffman* v. *United States*, 341 U. S. 479 (1951); *Sacher* v. *United States*, 343 U. S. 1 (1952); *Offutt* v. *United States*, 348 U. S. 11 (1954); *Cammer* v. *United States*, 350 U. S. 399 (1956); *Nilva* v. *United States*, 352 U. S. 385 (1957); *Yates* v. *United States*, 355 U. S. 66 (1957); *Green* v. *United States*, 356 U. S. 165 (1958); *Brown* v. *United States*, 359 U. S. 41 (1959); *Levine* v. *United States*, 362 U. S. 610 (1960); *Piemonte* v. *United States*, 367 U. S. 556 (1961); *Ungar* v. *Sarafite*, *ante*, at 575 (1964).

However, our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed, a matter not raised in this certification, might entitle a defendant to the benefit of a jury trial. See *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). There Mr. Justice Stone, later Chief Justice, citing many cases, said that "commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted." At 627. In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses.

(1888), and *In re Debs*, 158 U. S. 564, 595 (1895). And just one year before we decided *Green, supra*, Mississippi specifically approved, in *Young* v. *State*, 230 Miss. 525, 528 (1957), its previous holding that the "overwhelming weight of authority is that in such cases [contempt] they [the defendants] were not entitled to a jury trial." *O'Flynn* v. *State*, 89 Miss. 850, 862.[13]

We will make specific reference to only a few of the federal cases. As early as 1812 this Court held that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order . . . ." Mr. Justice Johnson in *United States* v. *Hudson & Goodwin*, 7 Cranch 32, 34. In the case of *In re Savin, supra*, at 276, the first Mr. Justice Harlan writing for the Court said: "[W]e do not doubt that the power to proceed summarily, for contempt, in those cases [in presence of court, in official transactions and in resistance to lawful process], remains, as under the act of 1831 . . . . It was, in effect, so adjudged in *Ex parte Terry* [*supra*, at 304]." And in *Eilenbecker* v. *District Court*, 134 U. S. 31 (1890), a contempt was based on the violation of a court order. Mr. Justice Miller said:

> "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it

[13] The constitution of Mississippi, like that of the United States, also assures the right of trial by jury in criminal cases. "In all criminal prosecutions the accused shall have a right to . . . trial by an impartial jury of the county where the offense was committed . . . ." Miss. Const., Art. III, § 26. "The right of trial by jury shall remain inviolate . . . ." Miss. Const., Art. III, § 31.

> should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power." At 36.

And in 1895 Mr. Justice Brewer in *In re Debs*, 158 U. S. 564, a leading authority in this Court, wrote:

> "Nor is there . . . any invasion of the constitutional right of trial by jury. . . . [T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." At 594–595.

Mr. Justice Holmes in an equally well known and authoritative decision for this Court, *United States* v. *Shipp*, 203 U. S. 563 (1906), upheld the power of this Court, without a jury, to punish disobedience to its orders. "The first question," he said, "naturally, is that of the jurisdiction of this court. The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303." At 572. He also emphasized that "[t]he court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case." At 574. Since *Shipp* was a case of original jurisdiction in this Court, testimony was then taken before a commissioner, not a jury, 214 U. S. 386, 471. After argument this

Court adjudged the defendants guilty, 214 U. S. 386, and sentenced some of them to prison, 215 U. S. 580.

Mr. Justice Holmes also wrote another leading case in the contempt field in 1914, *Gompers* v. *United States*, 233 U. S. 604, in which he made explicit what he left implicit in *Shipp, supra:*

> "The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court." At 606.
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> . . . . .
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> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury . . . . It does not follow that contempts of the class under consideration are not crimes, or rather, . . . offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right." At 610.

In 1919 Chief Justice White in *Ex parte Hudgings*, 249 U. S. 378, restated the same principle in these words:

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. . . . [The] only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured." At 383.

Finally, Mr. Justice Sutherland in *Michaelson* v. *United States,* 266 U. S. 42 (1924), in upholding the constitutionality of the sections of the Clayton Act contained in 18 U. S. C. §§ 402 and 3691, said that these provisions were of

> ". . . narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. *Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree*—that is to do something which a decree commands . . . . If the reach of the statute had extended to the cases which are excluded a different and more serious question would arise." At 66. (Emphasis supplied.)

It is true that adherence to prior decisions in constitutional adjudication is not a blind or inflexible rule. This Court has shown a readiness to correct its errors even though of long standing. Still, where so many cases in both federal and state jurisdictions by such a constellation of eminent jurists over a century and a half's span teach us a principle which is without contradiction in our case law, we cannot overrule it. The statement of the High Court of Errors and Appeals of Mississippi 105 years ago in *Watson* v. *Williams, supra,* is as true and perhaps even more urgent today: [14]

> "The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been re-

[14] The fact that *Watson* was a case of civil contempt is not relevant, since its rationale and language are broadly applicable to contempt cases in general. Further, *Watson* has recently been cited with approval in a Mississippi criminal contempt case, *Young* v. *State, supra,* where the Mississippi Supreme Court reaffirmed that there

garded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it. In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this State, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts, in the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government. The power to compel the lawless offender, against decency and propriety, to respect the laws of his country, and submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a *restraint* upon the upright, who need no restraint, and a license to the offenders, whom they are made to subdue." At 341–342.

The question certified to the Court is therefore answered in the negative.

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is no right to jury trial in cases of criminal contempt. *Watson* has also been cited by this Court as authority on criminal contempt. *In re Debs*, 158 U. S. 564, 595 (1895).

APPENDIX TO OPINION OF THE COURT.

This Appendix contains statutes and cases relevant to the punishments for contempt imposed by colonial courts. Although the authority cited here is extensive, it does not purport to be exhaustive. Research in this period of history is hampered by the fact that complete reports of appellate decisions in most jurisdictions were not available until the nineteenth century. Reports of the colonial trial courts are even more sparse, and this has particular importance in our study, since contempt citations were usually either not appealable or not appealed.

Numerous observations could be made concerning what is set forth here.[1] For our present purposes, however, we need only note that we find no basis for a determination that, at the time the Constitution was adopted, contempt was generally regarded as not extending to cases of serious misconduct. Rather, it appears that the limitations which did exist were quite narrow in scope, being applicable only to a specific contempt[2] or to a particular type of court.

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[1] For example, punishments of a former age must be judged by the standards of that time and not by the norms of the present. As Professor Zechariah Chafee observed: "The most significant fact is that the colonists seem to have made very little use of the favorite modern method of punishment by long terms of imprisonment. They got rid of the worst offenders by executions . . . ; the others they usually subjected to some short and sharp penalty and then turned them loose or else sold them into service. To imprison thieves and other rascals for years, as we do, would have cost the taxpayers dear, left the prisoners' relatives without support, and kept men idle when the community wanted man-power. Consequently, most offenders were let out after they had paid their fines and damages to the victim, or had been whipped or otherwise disgraced." 1 Records of the Suffolk County (Mass.) Court, 1671–1680, at lxxix.

[2] The type of statute most frequently found in the Colonies is that which provided for the punishment of witnesses or jurors who failed to appear in court as summoned. While in most Colonies this offense

CONNECTICUT.

The Code of 1650, a compilation of the earliest laws and orders of the General Court of Connecticut, provided "that whosoever doth dissorderly speake privately, during the sitting of the courte, with his neighbour" should pay 12 pence fine, "if the courte so thinke meett," and that whosoever revealed secrets of the General Court should forfeit 10 pounds "and bee otherwise dealt withall, at the discretion of the courte . . . ." Code of 1650 (1822 ed.), at 40. The same Code also decreed "[t]hat whosoever shall . . . defame any courte of justice, or the sentences and proceedings of the same, or any of the magistrates or judges of any such courte, in respect of any act or sentence therein passed, and being thereof lawfully convicted in any generall courte, or courte of magistrates, shall bee punnished for the same, by fyne, imprisonment, disfranchisement, or bannishment, as the quality and measure of the offence shall deserve." *Id.*, at 69. This provision was carried forward through the time of the adoption of the Constitution. See Conn. Laws of 1673 (1865 ed.), at 41, and Conn. Acts and Laws (1796 ed.), at 142.

An "Act concerning Delinquents" provided that "if any Person or Persons upon his or their Examination or Trial for Delinquency, or any other Person not under Examination or Trial as aforesaid, in the Presence of any Court, shall either in Words or Actions behave contemptuously or disorderly, it shall be in the power of the Court, Assistant, or Justice to inflict such Punishment upon him

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was regarded, and punished, as a contempt, it is not clear whether it was so regarded and punished in all jurisdictions.

Some Colonies had statutes making it a contempt for jailers, sheriffs, etc., to refuse to carry out an order of the court. In general, we have not included such statutes.

or them as they shall judge most suitable to the Nature of the Offence. *Provided,* That no single Minister of Justice [justice of the peace, whose criminal jurisdiction was limited to cases in which "the Penalty does not exceed the Sum of *Seven Dollars*"] shall inflict any other Punishment upon such Offenders than Imprisonment, binding to the Peace or good Behaviour to the next County Court, putting them in the Stocks, there to sit not exceeding two Hours, or imposing a Fine, not exceeding *Five Dollars.*" Conn. Acts and Laws (1796 ed.), at 143.

The first Connecticut statute we have been able to find which limited the power of all courts to inflict punishment summarily is cited in an 1824 edition of Connecticut statutes: "If any person, in the presence of any court, shall, either by words or actions, behave contemptuously or disorderly, it shall be in the power of the court to inflict such punishment upon him, by fine or imprisonment, as shall be judged reasonable: Provided, however, that no single minister of justice shall inflict a greater fine than seven dollars, nor a longer term of imprisonment than one month; and no other court shall inflict a greater fine than one hundred dollars, nor a longer term of imprisonment than six months." Conn. Pub. Stat. Laws, 1821 (1824 ed.), at 118–119. This statute applied only to acts of contempt committed in the presence of the court and left "all other cases of contempt to be ascertained and punished according to the course of the common law." *Huntington* v. *McMahon,* 48 Conn. 174, 196 (May Term, 1880). Accord, *Rogers Mfg. Co.* v. *Rogers,* 38 Conn. 121, 123 (February Term, 1871).

The same laws also made it a contempt, punishable summarily by commitment and fine of $200, to refuse to perform or accept service of a writ of habeas corpus. Conn. Pub. Stat. Laws, 1821 (1824 ed.), at 219–220.

Records of cases in the Particular Court between 1639 and 1663 reveal several summary contempt proceedings:

In 1639, Thomas Gridley was "Censured to be whipt att Hartford and bound to his good behavior" for, *inter alia*, using "contempteous words against the orders of Court . . . ." Records of the Particular Court of the Colony of Connecticut, 1639–1663, at 5. Enoch Buck was fined 10 shillings "for irregular speeches in Courte" in 1648. *Id.*, at 60. In 1654, Will Taylor was committed to prison for an unspecified length of time for his "Contemtuous Carriage in the Courte . . . ." *Id.*, at 128. John Sadler was ordered imprisoned for a day and fined 40 shillings in 1655 for "Contemptuous Carrage against the Courte and Magistrates . . . ." *Id.*, at 152. In 1657, both parties in a case were fined 10 shillings for disorderly carriage in court. *Id.*, at 187. In 1663, for, *inter alia*, "defameing the sentenc of the Court and one of the members thereof," Edward Bartlet was ordered to prison for about 10 days and made to give 10 pounds security for his good behavior. *Id.*, at 269. Connecticut Colony Particular Court records also indicate various fines and forfeitures, from two shillings, six pence, to four pounds, imposed on non-appearing parties and jurors between 1647 and 1654. (*E. g.*, Thomas Sherwood fined 40 shillings "for his contempte in not appeareing att Court uppon summons," *id.*, at 47.)

In 1796, Zephaniah Swift, chief justice of the Connecticut Superior Court, wrote of contempt: "But tho all courts but assistants and justices of the peace, have an *unlimitted discretionary power* [emphasis supplied], yet this cannot be deemed to authorize them to inflict capital punishment. It can be supposed to extend only to fine, imprisonment, or such corporal punishment as may be suited to the nature of the offence, and according to the principles of the common law." II Swift, A System of the Laws of Connecticut (1796), at 374.

In 1823, Swift added: "When courts punish for contempts, committed in their presence, they must inflict a

definite fine, or imprison for a certain time in the manner prescribed by the statute: but where they punish for contempts at common law, or not committed in their presence *they may imprison till the further order of the court . . . .*" (Emphasis supplied.) II Swift, A Digest of the Laws of Connecticut (1823), at 359.

DELAWARE.

We were unable to find any Delaware colonial statutes dealing generally with contempt. Two statutes, apparently passed during the early part of the eighteenth century, provided maximum penalties for certain types of offenses: Jurors who refused to attend could be summarily fined up to 20 shillings; and one who spoke in derogation of a court's judgment or committed any rudeness or misdemeanor in a court while the court was in session could be fined up to five pounds. 1 Del. Laws (1797 ed.), at 117, 120. A 1739 or 1740 "Act against drunkenness, [and] blasphemy" authorized a maximum fine of five pounds for one convicted [3] of using, upon arrest by court order, "abusive, reviling or threatning speeches against . . . [any] court . . . ." *Id.*, at 174. An 1852 Act provided that judges of the Superior Court could punish for contempt as fully "as the justices of the king's bench, common pleas, and exchequer in England, . . . may or can do." Del. Rev. Stat. (1852 ed.), at 317.

In 1818, the Kent Supreme Court said that "[f]or a contempt committed in the presence of a justice of the peace, he may either imprison the offender for a definite period or require sureties for his good behavior." *Patterson* v. *Blackiston*, 1 Del. Cases, 1792–1830 (Boorstin), at 571, 573.

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[3] It is not clear whether the use of the word "convicted" was intended to preclude summary punishment.

GEORGIA.

Our research has uncovered no Georgia colonial statutes dealing with contempt. An enactment in 1799 provided for the fine of witnesses and jurors who neglected or refused to appear. Section XX provided for attachment of witnesses and a fine not exceeding $300. Section XLIV provided for a fine of $40 for grand jurors and $20 for petit jurors. Ga. Digest of Laws (1822 ed.), at 205, 210, 215.

An 1801 statute set a fine of $10 as the amount of punishment that could be imposed upon a defaulting witness by a justice of the peace. Ga. Laws, 1801–1810 (1812 ed.), at 17. An 1811 statute made more specific mention of the contempt power of the justices of the peace, providing that these officers could fine or imprison for contempt, but not exceeding $2 or two days. Ga. Laws, 1811–1819 (1821 ed.), at 378.

The earliest reported Georgia contempt case is *State* v. *Noel,* Charlton's Reports (1805–1810) 43 (1806). There the mayor and marshal of the City of Savannah were fined $50 and $10 respectively for failing to comply with an order of the Superior Court directing them to suspend certain City Council proceedings. In 1807 the Superior Court said in *State* v. *White,* Charlton's Reports (1805–1810) 123, 136 (1807), that the inferior courts of record had the power to "inflict punishments at the discretion of the court, for all contempts of their authority." No specific punishment was indicated in that case. In *State* v. *Helvenston,* Charlton's Reports (1811–1837) 48 (1820), several jurors were fined $5 each for having talked with persons not officers of the court.

MARYLAND.

It appears that in colonial Maryland there was but one statutory enactment directly concerning contempts and

this Act was applicable only to the court of chancery. This was a 1785 Act providing that "in order to enforce obedience to the process, rules and orders, of the chancery court, in all cases where any party or person shall be in contempt for disobedience, non-performance or non-observance, of any process, rule or order, of the chancellor or chancery court, or for any other matter . . . wherein a contempt . . . may be incurred, such party or person shall . . . pay . . . a sum not exceeding ten pounds current money . . . and may stand committed . . . until the said process, rule or order, shall be fully performed . . . and until the said fine . . . shall be fully paid . . . ." II Kilty's Md. Laws, 1800, c. LXXII, § XXII.

Three other colonial Maryland Acts concerned only the punishments of jurors and witnesses who failed to appear as summoned and the enforcement of the rules of court. It is not clear whether these were treated as contempts. A law enacted in 1715 provided that any person duly served with process to appear as a witness who shall default and fail to appear, "shall be fined by the justices of the provincial court one thousand pounds of tobacco . . ." or by the county court, five hundred pounds of tobacco. I Dorsey's Md. Laws, 1692–1839 (1840 ed.), at 20. Another 1715 statute provided that the judges of the provincial and county courts in Maryland could "make such rules and orders from time to time, for the well governing and regulating their said courts . . . as to them in their discretion shall seem meet . . . [and shall enforce these rules with] such fines and forfeitures, as they shall think fit, not exceeding one thousand pounds of tobacco in the provincial court, and five hundred pounds of tobacco in the county court . . . ." I Dorsey's Md. Laws, 1692–1839 (1840 ed.), at 24.

In 1782 the fines to be imposed on witnesses and jurors who failed to appear were altered. The Act provided that "in all cases in which jurors or witnesses shall be sum-

moned to appear at the general court, and shall, without sufficient excuse, neglect to appear, the general court may fine . . . not exceeding thirty-five pounds current money." The same provision applied to the county courts, but there the fine was limited to 20 pounds. I Kilty's Md. Laws, 1799, c. XL.

The only reported Maryland case around the time of the adoption of the Constitution is *State* v. *Stone*, 3 Harris and McHenry 115 (1792). There the chief justice and associate justices of the Charles County Court were each fined 20 shillings and costs by the General Court for refusing to recognize a writ of certiorari which had been directed to them.

The Archives of Maryland report several contempt citations by the Provincial and County Courts from 1658 to 1675. The Provincial Court fined Attorney John Rousby 100 pounds of tobacco for violation of a court order that attorneys must speak in their proper turns. Arch. Md. LXV, 585 (1675). Rousby and two other attorneys were also fined 400 pounds of tobacco each for failing to appear at the Provincial Court and thus causing their clients to suffer nonsuits. Arch. Md. LXV, 383 (1674). And another attorney, who admitted that he had falsified a writ of the Provincial Court, was summarily disbarred from practice. Arch. Md. LXV, 50 (1672).

The county courts imposed punishments for misbehavior in the presence of the court: 500 pounds of tobacco for the use of abusive language in court, Arch. Md. LIV, 566 (1673); 300 pounds of tobacco for wearing a hat in the court's presence, Arch. Md. LIV, 146 (1658); 10 pounds of tobacco for taking the name of God in vain before the court, Arch. Md. LIII, 84 (1660); and 300 pounds of tobacco for using insolent language before the court, Arch. Md. LIV, 9 (1652). Between 1671 and 1674 the Provincial Court cited 23 persons for failure

to appear as jurors or witnesses in response to proper summonses. Each was fined 500 pounds of tobacco. Arch. Md. LXV, 18, 21, 23, 25, 29, 31, 32, 40, 45, 141, 203, 246, 314.

MASSACHUSETTS.

The Massachusetts Bay Colony and Plymouth Colony enacted many early statutes relating to contempt. In 1641 the General Court [4] decreed that no one in Massachusetts should be imprisoned before sentence if he could put up bail, except "in crimes Capital, and contempt in open Court, and in such cases where some expresse Act of Court doth allow it." Mass. Laws and Liberties (1648 ed.), at 28. Prior to 1648 another General Court order provided "Fine, Imprisonment, *Disfranchisement* or Bannishment" for one "lawfully convict" [5] in any General Court or Court of Assistants of defaming any court of justice, any court order, or any magistrate or judge with respect to a sentence imposed. *Id.*, at 36. In 1665 the General Court made a law permitting corporal punishment for the contempt of refusing to pay the fine imposed for "Prophanation of the Sabbath, Contempt or Neglect of Gods Publick Worship, Reproaching of the Laws, and Authority here Established . . . ." Mass. Colonial Laws, 1660 (1889 ed.), at 232.

Plymouth Colony laws provided that the Court of Magistrates could punish "by fine, imprisonment, binding to the Peace or good Behaviour" for disturbing the peace or defaming any court of justice or judge thereof with

[4] From 1634 at least until 1672, the General Court was "the chief Civil Power" of Massachusetts, its principal business being legislation. See 1 Records of the Suffolk County Court, 1671–1680, at xxi-xxii.

[5] It has been argued that the words "lawfully convict" indicate that formal process of indictment was required. See Haskins, Law and Authority in Early Massachusetts, at 278.

respect to any act or sentence. Compact with the Charter and Laws of New Plymouth (1836 ed.), at 249. Fines were provided for grand jurors who refused to serve (40 shillings), grand jurors who failed to appear (10 shillings), and nonappearing witnesses (20 shillings). *Id.*, at 263, 192 (Acts of 1671, 1681).

A 1692 Massachusetts Act provided fines for cursing in the hearing of a justice of the peace—five shillings for the first curse (or two hours in the stocks if unable to pay) and 12 pence for each curse thereafter (or three hours in the stocks). Mass. Bay Charter (1726 ed.), at 9. Various fines were established for nonappearing jurors (20 shillings before 1698, 40 shillings until 1711, four to six pounds until 1784, 40 shillings or five pounds as of 1784),[6] nonappearing witnesses (40 shillings),[7] and defendants who failed to appear before a justice of the peace (10 shillings).[8]

Many early contempt cases are contained in the Records of the Court of Assistants[9] of Massachusetts Bay Colony, 1630–1692, and in several of these, severe sum-

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[6] See I Province of Mass. Bay: Acts and Resolves (1869 ed.), at 335, *id.*, at 374; Mass. Bay Charter (1726 ed.), at 254; I Mass. Laws, 1780–1800 (1801 ed.), at 185, 189. See also Act providing that nonappearing grand jurors "shall be proceeded against for contempt." Mass. Colonial Laws (1887 ed.), at 88.

[7] I Province of Mass. Bay: Acts and Resolves (1869 ed.), at 374.

[8] *Id.*, at 72. Also *id.*, at 282–283.

[9] The Court of Assistants consisted of the governor, deputy-governor, and the other annually elected assistants or magistrates. It was the institutional ancestor of the Massachusetts Supreme Judicial Court and "also had the functions of an upper house of the legislature and a governor's council. For judicial business it met regularly twice a year . . . to hear and determine appeals from the County Courts, and to exercise original jurisdiction in 'all Causes of divorce, all Capital and Criminal Causes, extending to Life, Member or Banishment.'" I Records of the Suffolk County Court, 1671–1680, at xx–xxi.

mary punishments were inflicted. For example, in 1675 Maurice Brett "for his Contemptuous Carriage Confronting the sentenc of this Court" was sentenced to stand for an hour with his ear nailed to a pillory. At the end of the hour, the ear was to be cut off and he was to pay 20 shillings or be given 10 lashes. I Records of the Court of Assistants, at 57. Also: In 1643, Elizabeth Vane was ordered committed at the pleasure of the court for abusing one of the magistrates (she was released upon humble petition and acknowledgment), II Records of the Court of Assistants, at 132; in 1637 John Greene was fined 20 pounds, committed until the fine was paid, and told not to come into this jurisdiction again "upon paine of fine, or imprisonment at the pleasure of the Courte for speaking contemptuously of the magistrates," *id.*, at 71; in 1633 Captain John Stone was fined 100 pounds and prohibited from returning to the Colony without leave from the government "under the penalty of death" for abusing an officer of the court, assaulting him and calling him "A just asse," *id.*, at 35; in 1630 or 1631 Thomas Foxe was ordered whipped for saying that the court acted in a case "as if they hadd taken some bribe," *id.*, at 12; in 1634 John Lee was ordered whipped and fined "for calling . . . [a court officer] false-hearted knave & hard-hearted knave heavy friend," *id.*, at 43; in 1637 or 1638 Thomas Starr was ordered fined 20 pounds, committed and enjoined to acknowledge his fault the next week for speaking against an order of the court, *id.*, at 73; in 1638 Katherine Finch was ordered whipped and committed until the General Court for speaking against the magistrates and the Churches, *id.*, at 76; and in 1659 William Robbinson was ordered whipped 20 lashes for contemptuous speeches against the whole court and the governor, III Records of the Court of Assistants, at 68.

In addition, Court of Assistants records show: in 1632 Thomas Dexter was ordered set in the bilboes (device

used for punishment at sea, similar to stocks on land), disfranchised and fined 40 pounds for speaking reproachfully against the government and for finding fault with various acts of the Court, II Records of the Court of Assistants, at 30; in 1634 John Lee was ordered whipped and fined 40 pounds for speaking reproachfully of the government (including a statement that the Court of Assistants made laws to pick men's purses), *id.*, at 49; in 1636 Thomas Miller was ordered committed for an unspecified length of time for "certeine seditious & opprobrious speaches, saying wee are all rebells, & traytors" ("wee" probably referring to the court), *id.*, at 63; in 1638 or 1639 Robert Shorthose was ordered set in the bilboes for slighting the magistrate in his speeches, *id.*, at 81; and in 1640 George Hurne was ordered committed (in irons) and whipped for insolent and contemptuous carriage, *id.*, at 93. Various fines for contempts are also reflected in the records. The only instance we can find in which the Court of Assistants did not proceed summarily to punish what was probably considered a contempt is a 1686 case in which Samuell Shrimpton was indicted by grand jury for denying the power of the government, defaming the General Court and the County Court and causing such a tumult in the court to result in "breach of his Majesty's Government." I Records of the Court of Assistants, at 299.

In 1635 the General Court ordered John Endecott committed to prison for an unspecified period "for his contempt in protesting against the proceedeing of the Court . . . ." He was released upon submission and acknowledgment. See Haskins, Law and Authority in Early Massachusetts, at 207. The Records of the Suffolk County Court from 1680 to 1698 reveal two other cases in which men were ordered imprisoned for unspecified periods for "contemptuous carriage in open court." John

Farnum (1681), Records of the Inferiour Court of Pleas (Suffolk County Court), 1680–1698, at 111; John Jones (1685), *id.*, at 128. The Pynchon Court Record, 1639–1702, reveals three instances in which a magistrate fined men for contempts of court. See Colonial Justice in Western Massachusetts, 1639–1702, at 243, 271, 288.

In 1772, the Superior Court of Judicature ordered a party committed for an unspecified period for savagely snatching papers from his opponent's hand. *Thwing* v. *Dennie,* Quincy's Reports, 338. See also the 1767 charge to the grand jury of the chief justice of that court, in which he said that "[t]o strike a Man in the King's Court will subject the Offender to the Loss of his Hand and Imprisonment for Life," and implying that such sentence could be given by the court summarily. *Id.*, at 245.

New Hampshire.

The only relevant statutes existing in eighteenth century New Hampshire that our research has uncovered were those directed toward witnesses and jurors. An Act passed in 1791 provided that courts could attach any witnesses who failed to appear and, if no reasonable excuse was offered, fine them as much as 10 pounds. A justice of the peace was allowed to fine up to 40 shillings for the same offense. N. H. Laws (1792 ed.), at 96. Another Act of the same year provided that grand jurors who failed to appear could be fined up to three pounds. N. H. Laws (1792 ed.), at 105.

The 1792 New Hampshire Constitution specifically gave the power to punish for contempt to the house of representatives, senate, governor and council. The punishment which they could administer was limited to 10 days' imprisonment. N. H. Laws (1815 ed.), at 10. There was no mention of the contempt power of the New Hampshire courts.

NEW JERSEY.

Apparently no legislation concerning the punishment of contempts existed in New Jersey until after the adoption of the Constitution. The first statutory provision was enacted in 1798 and concerned only witnesses and jurors in courts for the trial of small causes, which courts had jurisdiction only where the amount in controversy did not exceed $60. The law provided that defaulting jurors or witnesses could be fined not more than $5 nor less than $1. N. J. Rev. Laws (1800 ed.), at 317. In the following year the legislature provided that any circuit court juror who either failed to appear or left a trial should be punished by a *reasonable* fine. N. J. Rev. Laws (1800 ed.), at 395. And also in that year an Act was passed dealing with the power of the Court of Chancery in matters of contempt. It provided that "to enforce obedience to the process, rules, and orders of the court of chancery, where any person shall be in contempt . . . he shall . . . pay . . . a sum not exceeding fifty dollars" and shall be confined until the order of the court is complied with and the fine and costs fully paid. N. J. Rev. Laws (1800 ed.), at 434.

In 1698 the Court of Common Right of East New Jersey fined a contemner 50 pounds and placed him in prison until it should be paid. Contemner had come before the court, demanded to know by what authority it sat, denied that it sat by the authority of the King and resisted when the constable took him into custody. *Case of Lewis Morrice*, I Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702, at 311.

NEW YORK.

Perhaps the earliest enactment concerning contempt in colonial New York was the Charter of Liberties and Priv-

ileges, passed by the General Assembly on October 30, 1683. Hamlin and Baker, I Supreme Court of Judicature of the Province of New York, 1691–1704, at 147. The Charter contained a broad provision assuring jury trials in numerous cases and stating that no freeman could be imprisoned, deprived of his freehold or liberty or exiled except by the judgment of 12 peers. However, there was a specific exception from this jury requirement when the fault charged was a contempt.

Our research has uncovered no other statutory provisions dealing with contempt in New York prior to the Constitution. An 1801 law provided that any person swearing in the presence or hearing of a justice of the peace, mayor, recorder or alderman could be placed, in a summary manner, in the stocks for one hour. N. Y. Laws, 1801 (1887 ed.), at 54. Then, in 1829, a fairly comprehensive statute was enacted, designating what actions constituted criminal contempts and limiting punishments to $250 fine and 30 days in jail. 2 N. Y. Rev. Stat., 1828–1835 (1836 ed.), at 207.

There are few reported cases of contempt in colonial New York. One notable instance occurred at the trial of John Peter Zenger in 1735. During the preliminary stages of the trial, Zenger's attorneys filed exceptions to the court, taking the position that the judges' commissions were defective because they had been appointed by Governor Cosby to serve "at pleasure" rather than "during good behavior" as required by law. The judges refused to allow Zenger's attorneys to argue in support of these exceptions, and, instead, cited the lawyers for contempt and disbarred them from further legal practice. The order stated: "*It is therefore ordered* that, for the said contempt, the said James Alexander and William Smith be excluded from any farther practice in this Court, and that their names be struck out of the roll of attorneys of this Court." Buranelli, The Trial of Peter Zenger, 89;

see also Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, 53–55.

A few colonial cases are mentioned in Goebel and Naughton, Law Enforcement in Colonial New York. Fines of 200 pounds were imposed by the New York Supreme Court in 1763 and 1764 for contempt in refusing to answer questions. At 243. In 1717 the Suffolk Court of Oyer and Terminer ordered a week of imprisonment for one who had affronted the King's Justices. *Id.*, at 606. And in 1729 the Supreme Court imposed a fine of 10 pounds upon one who had "privately given victuals to the jury." *Ibid.*

One post-colonial case is worthy of mention, the case of *John V. N. Yates*, 4 Johnson's Rep. 317 (1809). Yates, an officer of the Court of Chancery, was found in contempt for having forged a name upon a bill filed in that court. He was sent to jail "there to remain until the further order of the court." On writ of habeas corpus the New York Supreme Court held that this was a valid form of commitment and that the Supreme Court had no power to discharge anyone committed for contempt by the Chancery Court. The commitment in this case was not for the purpose of forcing Yates to comply with the will of the Chancery Court, but rather, for punishment. Thus, Yates was imprisoned during the pleasure of the court for a criminal contempt.

North Carolina.

Prior to 1868, North Carolina had few statutes dealing with offenses which might have been considered contempts: A 1741 Act carrying a fine of two shillings and six pence for profanely swearing or cursing in a hearing of a justice of the peace, and a fine of 10 shillings or punishment of up to three hours in the stocks for swearing or cursing in the presence of any court of record, I N. C. Pub. Acts, 1715–1790 (Iredell, 1804 ed.), at 52; a 1777 Act

providing a fine of 50 pounds for nonappearance of witnesses, I N. C. Laws (Potter, 1821 ed.), at 298; a 1779 Act fining jurors who failed to appear at superior courts 200 pounds and fining nonappearing "bystanders" 50 pounds, I N. C. Pub. Acts, 1715–1790 (Iredell, 1804 ed.), at 279; and a 1783 Act changing the fine against jurors to 10 pounds and establishing fines of five pounds for failing to appear as county court jurors and 20 shillings for nonappearing "talismen," *id.*, at 332.

The first general statute in North Carolina limiting the power to punish summarily for contempt was enacted in 1868 or 1869. It provided a maximum penalty of $250 and 30 days' imprisonment. Statutes of 1868–1869, c. 177, § 2, cited in Battle's Revisal of the N. C. Pub. Stat. (1873 ed.), at 257.

PENNSYLVANIA.

Prior to the adoption of the Constitution there were three Pennsylvania statutes relevant to the punishment of contempts. The Act of 1713, which established the orphans' courts of Pennsylvania, provided that "if any person . . . summoned to appear . . . shall make default, the Justices may send their attachments for contempts, and may force obedience to their warrants, sentences and orders, concerning any matter or thing cognizable in the same courts by imprisonment of body, or sequestration of lands or goods, as fully as any court of equity may or can do." I Pa. Laws, 1700–1781 (1810 ed.), at 84.

A 1715 Act, creating the "Supreme or Provincial Court of Law and Equity," provided in § I that this court would "exercise the jurisdictions and powers hereby granted concerning all and singular the premises, according to law, as fully and amply to all intents and purposes whatsoever, as the justices of the courts of King's Bench, common pleas and exchequer at Westminster, or any of them, may

or can do" [10] and to "correct and punish the contempts, omissions and neglects, favors, corruptions and defaults of all or any of the justices of the pleas, sheriffs, coroners, clerks and other officers within the said respective counties." III Pa. Stat. at Large, 1712–1724 (1896 ed.), at 66–67. Section III of the same Act provided that when sitting as a court of equity, this court could enforce obedience to its orders and decrees by "like process, orders and proceedings thereupon, as are and hath been used in like cases in or by the said courts of chancery or exchequer in Great Britain . . . ." III Pa. Stat. at Large, 1712–1724 (1896 ed.), at 68.

In 1722, Pennsylvania passed "An Act for Establishing Courts of Judicature in this Province." Section VI said that these courts "shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of King's Bench, common pleas and exchequer at Westminster, or any of them, may or can do." III Pa. Stat. at Large, 1712–1724 (1896 ed.), at 303.

No Pennsylvania enactment was specifically directed to the matter of criminal contempt until 1809. By the terms of this Act, the summary contempt power of the several courts of the commonwealth was limited to official misconduct of court officers, disobedience of court process by officers, parties, jurors or witnesses and misbehavior of any person in the presence of the court. The punishment of imprisonment for contempts was applicable "only to such contempts as are committed in open court; and all other contempts shall be punished by fine only." Pa. Laws, 1808–1812, at 55–56.

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[10] It has not been contended that the courts of England were limited to trivial punishments for contempt.

In *Feree* v. *Strome,* 1 Yeates 303 (1793), a witness failed to appear as summoned to the Nisi Prius Court of Lancaster County. "He was reprimanded for his conduct, but as he asserted, that he did not conceive himself to be subpoenaed, he was dismissed without any fine." In *Respublica* v. *Oswald,* 1 Dall. 343 (1788), the Pennsylvania Supreme Court levied a fine of 10 pounds and an imprisonment of one month upon one who published a contemptuous article. In passing sentence the court said: "some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other we have seen your conduct: your circumstances are small, but your offense is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case." At 353.

The Supreme Court issued attachment for a contempt against another publisher in *Bayard* v. *Passmore,* 3 Yeates 438, 441 (1802). Contemner was required to secure his appearance by posting $300 and was admonished to "consider well, what atonement he will make to the court . . . for the gross injury." It is later reported that contemner was fined $50 and imprisoned for 30 days, to remain in prison until the fine and costs were paid. 3 Yeates 442.

The Records of the Courts of Quarter Sessions and Common Pleas of Bucks County, Pennsylvania, 1684–1700, report several contempt attachments. Thomas Coverdale was fined five shillings for coming into court drunk. (At 111.) Nine jurors were fined five shillings apiece for their failure to appear as summoned. (At 391.) Two others were fined three shillings apiece for the same offense. (At 211.) And there are three reports of one Richard Thatcher being committed for abusing the justices on the bench. (At 100, 198, 208.) In each instance he was held in custody until the next day when he was

fined 50 shillings and committed until he could produce sureties for his good behavior and his appearance at the next term of court. (At 101, 199, 208.)

RHODE ISLAND.

The only laws existing in colonial Rhode Island which in any way concerned contempt of court were confined to the punishment of witnesses and jurors for failure to appear in court. An Act which was in force in 1798 but which probably dated back to 1729, provided that if a witness failed to appear, the court could bring him before it by writ of attachment and impose a fine not exceeding $20 and place the witness in prison until the fine was paid. R. I. Laws (1798 ed.), at 206. Another Act, of like dates, provided that jurors who failed to appear should forfeit and pay a sum not exceeding $5. R. I. Laws (1798 ed.), at 185.

Research has disclosed very few contempt cases from colonial Rhode Island. However, several cases are reported from the Court of Trials of the Colony of Providence Plantations between 1647 and 1670. In two instances where persons used contemptuous words before this court they were required to post bond of 10 pounds sterling to secure their future good behavior. I R. I. Court Records, 1647–1662, at 29, 51. A fine of five shillings was imposed upon another who used contemptuous words to the court while drunk. II R. I. Court Records, 1662–1670, at 58. And between 1647 and 1662 a total of 20 persons were fined 10 shillings each for failure to appear as jurors when summoned. I R. I. Court Records, 1647–1662, at 16, 19, 29, 30, 35, 73, 77.

SOUTH CAROLINA.

It appears that colonial South Carolina imposed broader restraints upon its courts in the punishment of contempts than any other Colony. A 1702 Act provided

that a witness who failed to appear at the Court of General Sessions should pay 10 pounds plus damages, or up to 100 pounds if he appeared but refused to give evidence. The witness could be imprisoned until the fine was paid. II S. C. Pub. Stat. Law (Brevard, 1814 ed.), at 338. A 1731 statute re-enacted these provisions and provided that nonappearing jurors could be summarily fined 40 shillings. S. C. Pub. Laws (Grimke, 1790 ed.), at 129, 126. Under the same Act, judges were permitted to fine up to 10 pounds for "any misbehaviour or contempt" in court and to imprison until payment was made; and if any person used violence in the courts, the judge could fine at his discretion and imprison until payment was made. *Id.*, at 129. An 1811 Act provided that when an affray occurred "to the disturbance of the court," when the court was sitting, the judge could order the offenders brought before him and "make such order or orders . . . as is or may be consistent with law, justice and good order." Acts and Resolutions of the S. C. General Assembly, December, 1811, at 33.

In *Lining* v. *Bentham*, 2 Bay's Reports 1 (1796), a justice of the peace had ordered a man imprisoned for accusing the justice with gross partiality and abuse of power. The South Carolina Constitutional Court of Appeals affirmed the "power of a magistrate to commit for insults or contempts" offered in the presence of the court. The court, however, added the *dictum* that contempts committed out of the presence of the court "ought to" be prosecuted by indictment.

In *State* v. *Johnson*, 1 Brevard's Reports 155 (1802), a justice of the peace had ordered a woman imprisoned for an unspecified length of time for coming to his office, treating him contemptuously and threatening him. The Charleston Constitutional Court held that the 1731 Act providing punishment by fine for contempt in court did

not apply to justices of the peace, who have "indispensably requisite" power to commit for contempt.

In *State* v. *Applegate*, 2 McCord's Reports 110 (1822), a justice of the peace had ordered a constable imprisoned for failing to carry out his duties. The Charleston Constitutional Court ruled that the constable had to be discharged, as all courts have the power "[t]o commit for a contempt done in the face of a court," but the power to imprison for a contempt done out of court is reserved to "courts of the highest jurisdiction."

VIRGINIA.

The only colonial Virginia contempt statutes which we were able to find were Acts specifying fines, usually in terms of pounds of tobacco, for nonappearance of jurors and witnesses.[11] A 1788 Act established a maximum fine of 10 pounds sterling for jurors "guilty of a contempt to the court . . . ." 12 Hening's Va. Stat. at Large, at 746. In 1792, the limit was changed to $30. Va. Acts (1803 ed.), at 101. Another 1792 Act set forth procedures to be followed in issuing and pursuing process of contempt. Va. Acts (1803 ed.), at 66, 90–91.

The first general contempt statute was passed in 1831. It specified four different categories of contempts in which judges had power to inflict punishments summarily. The power to punish the first class of contempts—mis-

[11] 1660: witnesses fined 1,000 pounds of tobacco for quarter courts, 350 pounds of tobacco for county courts, 2 Hening's Va. Stat. at Large, at 23–24, 69; 1734: petit jurors before justices of Oyer and Terminer fined up to 400 pounds of tobacco, 4 Hening's Va. Stat. at Large, at 404; 1777: witnesses not attending the General Court fined five pounds (sterling) or 1,000 pounds of tobacco, plus costs, Va. Pub. Acts (1785 ed.), at 73; 1788: same fine for District Court witnesses, 12 Hening's Va. Stat. at Large, at 748; 1792: grand jurors fined up to $8, Va. Acts (1803 ed.), at 100.

behavior in the presence of courts—was limited to $50 or 10 days' imprisonment. The other categories—violence or threats of violence to judges, witnesses or jurors, misbehavior of court officers in official transactions, and disobedience to a court order—were not specifically limited.[12] Supp. to the Va. Rev. Code (1833 ed.), at 143–144.

In Criminal Law in Colonial Virginia, Arthur P. Scott discusses early Virginia contempt cases. He states that "[c]ontempt of court was sharply reproved. The least that was required was an open apology, and the court often added a fine, or commitment to prison, usually to last until bond for good behavior was furnished. Sometimes an hour or two in the stocks was prescribed." At 171–172.[13] Scott concludes: "On the whole, a review of the attitude of the Virginia magistrates would indicate that they acted reasonably and moderately. The power

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[12] See *Yoder* v. *Commonwealth*, 107 Va. 823, 833: "The first class is, 'Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.' But the limitation of [this] section . . . does not apply to the second, third, fourth and fifth classes into which [the general] section . . . is divided."

[13] The following are cases cited by Scott at 172–173: In 1662, William Hatton was bound over to the General Court for saying (outside court) that the justices were not fit to sit; in 1684, Robert Smith had to petition humbly for saying that the court had done more than it could answer or justify; in 1685, Humphrey Chamberlain was put in jail for standing with a drawn sword in the road between the courthouse and the ferry and fined five pounds sterling plus the cost of repairing the prison for breaking his way out; in 1703, Mary Russell was ordered to jail until she could give bond for good behavior for saying that she had gotten as little justice in court as she would have in hell with the devil sitting as judge; in 1720, Colonel Bolling was similarly punished for calling on God to damn the justices; and in 1748, Richard Dunning was ordered committed for saying that the judges never did any good.

to punish for contempt is always open to abuse. The persons injured are judges in their own case. The only safeguard, outside of public opinion, lies in the character of the persons intrusted with this power." At 174.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

For many reasons I cannot agree with the Court's opinion. In the first place, Congress has never expressly given the Federal Courts of Appeals jurisdiction to try and punish people for criminal contempt of court, and I am unwilling to hold that such a power exists in these courts in the absence of a clear and unequivocal congressional grant. The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt and delay their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work.[1] And in particular, I believe that it is highly disruptive and downright injurious to appellate courts for them to attempt to take over and try criminal contempt cases, surcharged as these cases almost always are with highly emotional quarrels. Compare, *e. g.*, cases cited in *Green* v. *United States*, 356 U. S. 165, 199, n. 8 (dissenting opinion). Appellate courts are too useful a part of our judicial system to be subjected to such unnecessary ordeals. I say unnecessary because trial courts are as qualified and capable to try criminal contempt cases as they are to try others.

Assuming, however, that a United States Court of Appeals does have jurisdiction to try criminal contempt

[1] What I have said above, of course, has no application whatever to the useful practice, authorized by statute, by which circuit judges sometimes sit on District Courts and district judges sometimes sit on Courts of Appeals. See 28 U. S. C. §§ 2284, 291, 292.

cases, I agree for the reasons set out in Part A of my Brother GOLDBERG's dissenting opinion that Congress has commanded that defendants in those cases be accorded a right to trial by jury. His powerful arguments on this point stand unanswered by the Court. Even in construing statutes and rules governing civil cases we have taken pains, as Congress commanded, to resolve all doubts in favor of trial by jury as guaranteed by the Seventh Amendment.[2] We should certainly be equally alert to construe statutes governing trials for criminal contempt so as to protect the right of jury trial guaranteed for the "Trial of all crimes" by section 2, cl. 3 of Article III of the original Constitution and for "all criminal prosecutions" by the Sixth Amendment.

I think that in denying a jury trial here the Court flies in the face of these two constitutional commands. My reasons for this belief were stated in *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion), and in other opinions cited in the margin which I have written or to which I have agreed.[3] No provisions of the Consti-

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[2] See *Dairy Queen, Inc.*, v. *Wood*, 369 U. S. 469; *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500. See also *Simler* v. *Conner*, 372 U. S. 221. The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[3] See also, *e. g.*, *In re McConnell*, 370 U. S. 230; *In re Murchison*, 349 U. S. 133; *Offutt* v. *United States*, 348 U. S. 11; *In re Oliver*, 333 U. S. 257; *Ungar* v. *Sarafite*, *ante*, at 592 (DOUGLAS, J., dissenting); *Piemonte* v. *United States*, 367 U. S. 556, 565 (DOUGLAS, J., dissenting); *Levine* v. *United States*, 362 U. S. 610, 620 (dissenting opinion); *Brown* v. *United States*, 359 U. S. 41, 53 (WARREN, C. J., dissenting); *Yates* v. *United States*, 355 U. S. 66, 76 (DOUGLAS, J., dissenting); *Nilva* v. *United States*, 352 U. S. 385, 396 (dissenting opinion); *United States* v. *United Mine Workers*, 330 U. S. 258, 328 (opinion of BLACK and DOUGLAS, JJ.).

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tution and the Bill of Rights were more widely approved throughout the new nation than those guaranteeing a right to trial by jury in all criminal prosecutions. Subsequent experience has confirmed the wisdom of their approval. They were adopted in part, I think, because many people knew about and disapproved of the type of colonial happenings which the Court sets out in its appendix—cases in which, as reported by the Court, people had been sentenced to be fined, thrown in jail, humiliated in stocks, whipped, and even nailed by the ear to a pillory, all punishments imposed by judges without jury trials. Unfortunately, as the Court's opinion points out, judges in the past despite these constitutional safeguards have claimed for themselves "inherent" power, acting without a jury and without other Bill of Rights safeguards, to punish for criminal contempt of court people whose conduct they find offensive. This means that one person has concentrated in himself the power to charge a man with a crime, prosecute him for it, conduct his trial, and then find him guilty. I do not agree that any such "inherent" power exists.[4] Certainly no language in the Constitution permits it; in fact, it is expressly forbidden by the two constitutional commands for trial by jury. And of course the idea that persons charged with criminal offenses such as criminal contempt are not charged with "crimes" is a judicial fiction. As I said in *Green*, I think that this doctrine that a judge has "inherent" power to make himself prosecutor, judge and jury seriously encroaches upon the constitutional right to trial by jury and should be repudiated.

In *Green* the Court affirmed a three-year sentence imposed for criminal contempt. But now in note 12 of its opinion in the present case the Court has inserted an

[4] See *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion), and opinions cited, *supra*, n. 3.

ambiguous statement which intimates that if a sentence of sufficient "severity" had already been imposed on these defendants, a majority of the Court would now overrule *Green* in part, by holding that if a criminal contempt charge is tried without allowing the defendant a jury trial, punishment is constitutionally limited to that customarily meted out for "petty offenses." [5] I welcome this as a halting but hopeful step in the direction of ultimate judicial obedience to the doubly proclaimed constitutional command that all people charged with a crime, including those charged with criminal contempt, must be given a trial with all the safeguards of the Bill of Rights, including indictment by grand jury and trial by jury.

Whatever is included within the scope of "petty offenses," certainly if the present defendants committed the acts with which they are charged, their crimes cannot be classified as "petty," but are grave indeed. These defendants nevertheless, like others charged with crimes, should have their cases heard according to constitutional due process, including indictment and trial by jury. Nothing less can measure up to the kind of trials which Article III and our Bill of Rights guarantee. It is high time, in my judgment, to wipe out root and branch the judge-invented and judge-maintained notion that judges can try criminal contempt cases without a jury.[6] It will

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[5] "Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." *Ante*, p. 695.

[6] Of course, "it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial de-

be a fine day for the constitutional liberty of individuals in this country when that at last is done.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

In response to the certified question, I would answer that defendants have both a statutory and a constitutional right to have their case tried by a jury.

A. THE STATUTORY RIGHT TO A JURY TRIAL.

Defendants claim that 62 Stat. 844, 18 U. S. C. § 3691, entitles them to a jury trial in this case. That statute provides in relevant part that "the accused, upon demand therefor, shall be entitled to trial by a jury" whenever the alleged contempt "shall consist in willful disobedience of

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crees. . . . In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically as well as historically, in determining the permissible mode of trial under the Constitution." *Green* v. *United States*, 356 U. S. 165, 197–198 (dissenting opinion). It was this kind of *conditional* imprisonment for the purpose of compelling obedience to a valid court order that was involved in *Watson* v. *Williams*, 36 Miss. 331, which the Court stresses so heavily at the concluding part of its opinion. In that Mississippi case Watson refused to deliver property to minor children whose guardian he had been. The lower court had entered an order "committing the plaintiff to the jail of Lowndes county for safe keeping, *until he comply with the order of the court.*" *Id.*, at 340. (Emphasis added.) The Supreme Court of Mississippi dismissed the appeal for want of jurisdiction. As I said in *Sacher* v. *United States*, 343 U. S. 1, 22 (dissenting opinion), with respect to this kind of conditional civil contempt order, I agree with this statement of Mr. Justice Holmes: "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 425–426 (dissenting opinion).

any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress . . . ," except if the alleged contempt is "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." The statutory right to a jury trial thus turns on three essential factors: (1) the source of the order; (2) the nature of the alleged violation; and (3) the character of the party that "brought or prosecuted" the "suit or action." I conclude for the reasons stated below that the District Court was the source of the basic order in this case; that the nature of the alleged violation would make it a criminal offense under 74 Stat. 86, 18 U. S. C. (Supp. IV) § 1509; and that the "suit or action" in the case was brought and prosecuted not by the United States, but by James Meredith, a private party. It follows that defendants have a statutory right to be tried for their alleged contempt by a jury of their peers.

1. *The Source of the Order.*

The show-cause order entered by the Court of Appeals on January 4, 1963, specified three earlier orders which defendants allegedly violated.[1] The acts committed were alleged to be "for the purpose of preventing compliance with this Court's [the Court of Appeals'] order of July 28, 1962, and of the similar order of the United States District Court for the Southern District of Mississippi, entered on September 13, 1962, and were in wilful disobedience and defiance of the temporary restraining order

[1] The show-cause order is printed *infra*, at 760, as Appendix A to this opinion. The relevant orders in this case are also reported in 7 Race Rel. L. Rep. 739 *et seq.*

of this Court [the Court of Appeals] entered on September 25, 1962." A brief analysis of the background and content of each of these three orders is necessary to an undertanding of the problem.

After James Meredith was denied admission to the University of Mississippi, he filed suit in the United States District Court for the Southern District of Mississippi, which denied the requested relief. On appeal, the United States Court of Appeals reversed the judgment and directed the District Court to order Meredith's admission. The mandate of the Court of Appeals was then stayed by a single judge of that court. The Court of Appeals immediately recalled its mandate, issued a new one explicitly directing the District Court forthwith to issue a permanent injunction compelling Meredith's admission to the University, and vacated the stay granted by the single judge. On July 28, 1962, the Court of Appeals, in aid of its appellate jurisdiction, issued its own preliminary injunction,[2] "[p]ending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders . . . ." The Court of Appeals' preliminary injunction, which ran against "the . . . [defendants,] all persons acting in concert with them, as well as any and all persons having knowledge of the decree . . . ," was substantially the same as the permanent injunction which the Court of Appeals directed the District Court to enter. A single judge again stayed the mandates of the Court of Appeals, but on September 10, 1962, MR. JUSTICE BLACK, after consultation with the members of this Court,

[2] The "preliminary injunction" was actually "issued" on July 27, 1962, as part of an opinion signed by Judge Wisdom. The order, which is printed *infra*, at 763, as Appendix B to this opinion, is dated July 28, 1962.

vacated all the stays issued by the single judge of the Court of Appeals.[3]

Three days later, on September 13, 1962, the District Court, declaring that the "matter is now before [it] by virtue of the Mandate of the United States Court of Appeals for the Fifth Circuit and the Mandate of Mr. Justice Black . . . ," issued a permanent injunction as directed by the Court of Appeals.[4] This injunction was substantially identical with the preliminary injunction issued by the Court of Appeals on July 28, 1962.

At this juncture, therefore, two substantially identical injunctions appear to have been in effect: the "preliminary" one issued by the Court of Appeals on July 28, 1962; and the "permanent" one issued by the District Court on September 13, pursuant to the mandate of the Court of Appeals. The show-cause order subsequently entered against defendants by the Court of Appeals alleges separate violations of both injunctions. It seems clear, however, that any act allegedly committed by contemners in violation of the preliminary injunction would necessarily have violated the permanent injunction as well. This Court has held that a single act or course of conduct alleged to be in violation of two identical orders cannot be punished as two separate contempts. See *Yates* v. *United States,* 355 U. S. 66. Also see *United States* v. *Costello,* 198 F. 2d 200. This is no less true if the two orders were issued by different federal courts, especially if the earlier order was designated "preliminary" and the later one "permanent." I would conclude therefore that, at least for purposes of a contempt conviction, the preliminary injunction entered by the Court of Appeals on July 28, 1962, to protect its appellate jurisdiction, was superseded by the substantially identical permanent

[3] 83 S. Ct. 10.

[4] The District Court's permanent injunction is printed *infra,* at 766, as Appendix C to this opinion.

injunction entered by the District Court on September 13, pursuant to the mandates of the Court of Appeals and MR. JUSTICE BLACK.

It is argued, however, that the preliminary injunction entered by the Court of Appeals on July 28, 1962, explicitly applied until James Meredith's "actual admission" to the University. This part of the Court of Appeals' order must be construed in the context of the other orders entered on July 28, 1962, and the immediately preceding days. During this time the Court of Appeals was attempting finally and definitively to secure James Meredith's admission to the University. To accomplish this, it concluded, correctly I think, that there should be no lapse in the operation of the substantive terms of the injunction until the desired end had been achieved. Therefore, the Court of Appeals announced the terms of the injunction which would be in effect from that time until Meredith's admission was secured. It also issued a mandate requiring the District Court to incorporate these terms into a permanent injunction. The operative effect of these orders was that, in the event that the District Court's permanent injunction failed fully to incorporate the substantive terms of the Court of Appeals' preliminary injunction, then the unincorporated provision would remain in effect as an order of the Court of Appeals. But in the event that the District Court's permanent injunction fully incorporated the substantive terms of the Court of Appeals' preliminary injunction, then the injunction would become an order of the District Court. In this way, the Court of Appeals was assured that each of the substantive terms of its injunction would remain in effect from the time of the order until Meredith's admission and that none of the terms of the injunction would simultaneously be incorporated in orders of two courts. The District Court's permanent

injunction did in fact incorporate all the substantive terms of the Court of Appeals' preliminary injunction. Thus, so long as it remained in effect, as it did until Meredith's admission, it necessarily superseded the Court of Appeals' preliminary injunction. It follows from this, that defendants' acts which allegedly violated both the Court of Appeals' order of July 28, 1962, and the District Court's order of September 13, 1962, must be deemed only alleged violations of the District Court's permanent injunction of September 13, 1962. Any allegation of contempt of the Court of Appeals' preliminary injunction of July 28, 1962, must be deemed without legal significance for purposes of this proceeding.

The third and last order which defendants were accused of violating was "the temporary restraining order of this Court [the Court of Appeals] entered on September 25, 1962." [5] That order specifically named defendant Barnett and others and temporarily restrained them "and all persons in active concert or participation with them" from "interfering with or obstructing" compliance with the Court of Appeals' order of July 28, 1962, and with the District Court's order of September 13, 1962. It also restrained them from committing other designated acts which were not specifically covered by the earlier orders (*e. g.*, instituting civil or criminal actions against Meredith). Defendants, however, were not accused in the show-cause order of violating the *entire* temporary restraining order of September 25, 1962, but only that part of the order restraining them "from interfering with or obstructing the enjoyment of rights or the performance of duties under the order of this Court [the Court of Appeals] of July 28, 1962, in the case of *Meredith* v. *Fair*, and a similar order of the District Court for the Southern

[5] The Court of Appeals' temporary restraining order is printed *infra*, at 769, as Appendix D to this opinion.

District of Mississippi in that case . . . ." Each specified violation in the show-cause order related to the permanent injunction of September 13, 1962, and the preliminary injunction of July 28, 1962. Defendants, in their notice of "the essential facts constituting the criminal contempt charged," Rule 42 (b), Fed. Rules Crim. Proc., received no notice that they were being charged with violating any provisions of the Court of Appeals' temporary restraining order of September 25, 1962, other than those derived directly from the earlier orders.

With respect to the alleged contempt here charged, therefore, the Court of Appeals' temporary restraining order added nothing to the earlier orders, except to name specifically one of the defendants. But this was obviously unnecessary, as the Government must concede. Governor Barnett must be deemed included within the coverage of the earlier orders enjoining "all persons acting in concert with [the named defendants], as well as any and all persons having knowledge of the decree . . . ." Were this not so, Governor Barnett's alleged contempts of the earlier orders would have to fall, as would Lieutenant Governor Johnson's alleged contempt of all the orders he is accused of violating, since he was not specifically named in any of them.

Thus, unless form is to prevail over substance, we must conclude that there has been no independently alleged violation of the Court of Appeals' temporary restraining order of September 25, 1962. That order therefore has no bearing on whether defendants have a statutory right to a jury trial.

In sum, therefore, I conclude that the District Court's permanent injunction of September 13, 1962, superseded and replaced the Court of Appeals' substantially identical preliminary injunction of July 28, 1962, and that the Court of Appeals' temporary restraining order

of September 25, 1962, as it is relevant here, added nothing to the earlier orders. Thus, although the show-cause order alleged contempts of two orders of the Court of Appeals and one order of the District Court, I would hold that for purposes of deciding whether 18 U. S. C. § 3691 is applicable, defendants have been charged with violating only one order, which was issued by a "district court of the United States."

Even if I were to agree with the Court, however, that defendants were effectively charged with contempt of all three orders, my conclusion would remain the same. The statute does not say in negative terms that whenever the alleged contempt "shall consist in willful disobedience of any lawful . . . order" of any Court of Appeals, the accused shall *not* be entitled to a trial by a jury. It says in affirmative terms that whenever the alleged contempt "shall consist in willful disobedience of any lawful . . . order . . . of any district court . . . , the accused . . . *shall* be entitled to trial by a jury." (Emphasis added.) Defendants here are charged with disobedience of an order of a District Court. The fact that they are charged *also* with disobedience of orders of a Court of Appeals should not defeat their statutory right to a jury trial.

2. *The Nature of the Alleged Violation.*

The second relevant question in deciding whether defendants have a statutory right to a jury trial is whether "the act or thing done or omitted also constitutes a criminal offense under any Act of Congress . . . ." 18 U. S. C. § 3691. This is not in dispute here. The question certified by the Court of Appeals specified that "the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense under an Act of Congress . . . ." While the Court is not bound by the facts assumed in a certified question, it is clear here

that contemners' alleged acts would constitute violations of 18 U. S. C. (Supp. IV) § 1509.[6] The Government does not dispute this.

3. *The Character of the Party Which Brought the Suit or Action.*

The third and final question in deciding whether defendants have a statutory right to a jury trial is whether the alleged contempt was "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." 18 U. S. C. § 3691.

The Government contends that it entered the case on September 18, 1962, and that the Court of Appeals' temporary restraining order of September 25, 1962, which was issued on its motion, was thus an order entered in a suit or "action brought or prosecuted in the name of, or on behalf of, the United States." My previous conclusion—that the Court of Appeals' order of September 25, 1962, was of no legal significance so far as the charged contempts are concerned—provides a complete answer to the Government's contention. If I am correct in concluding that the only operative order was the permanent injunction entered by the District Court on September 13, 1962, at a time when no one claims the United States had any formal interest in the case, then it necessarily follows that defendants are charged with contempt of an order entered in a suit brought in the name of, and on behalf of, a private party, and not the United States.

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[6] The statute provides in relevant part that:

"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Even assuming, *arguendo*, that the Court of Appeals' order of September 25, 1962, had some independent legal significance, I could not conclude, as the Court does, that it was "entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." The Court of Appeals' order authorizing the United States to participate in the case, authorized it to participate "as *amicus curiae*," not as a party. It also authorized the United States "to submit pleadings, evidence, arguments and briefs and to initiate such further proceedings, including proceedings for injunctive relief and proceedings for contempt of court . . . ." The Court of Appeals entered the temporary restraining order of September 25, 1962, on motion made by the United States pursuant to this authorization. But the applicable statute does not exempt from the protection of a jury trial "contempts committed in disobedience of any lawful . . . order . . . entered" *upon motion by the United States.* It only exempts contempts committed in disobedience of "any lawful . . . order . . . entered *in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.*" (Emphasis added.) The touchstone of the exemption is thus the party who brought or prosecuted the basic *suit or action*, not the party upon whose motion the violated order was entered. This reading of the statute is buttressed by the repeated references in the congressional debates to suits where the United States is a "party." See, *e. g.*, 48 Cong. Rec. 8780, 8785; 51 Cong. Rec. 9672, 14413, 15946.

The Government contends, however, that it was, in effect, a party to the suit, because of:

> "[t]he critical fact . . . that in instituting and prosecuting those proceedings the United States was asserting an interest of its own separate and distinct from that of the plaintiff in the original action.

> The interest of the United States was the sovereign's independent concern for preserving the integrity of its courts and vindicating their authority."

But this alone does not convert the United States from an *amicus curiae* into a party. A traditional function of an *amicus* is to assert "an interest of its own separate and distinct from that of the [parties]," whether that interest be private or public. It is "customary for those whose rights [depend] on the outcome of cases . . . to file briefs *amicus curiae*, in order to protect their own interests." Wiener, Briefing and Arguing Federal Appeals, 269 (1961). This Court has recognized the power of federal courts to appoint *"amici* to represent the public interest in the administration of justice." *Universal Oil Products Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 581. In this case the Government was serving essentially in that capacity. Its ultimate interest—securing compliance with the courts' orders requiring Meredith's admission—was identical with the interest of the private plaintiff, and it was invited by the court to render necessary aid in that direction.

The Government's argument thus goes too far. "After all, a federal court can always call on law officers of the United States to serve as *amici*" "to represent the public interest in the administration of justice." *Ibid.* The Government has "an interest of its own" in vindicating its authority in every instance where the orders of its courts are violated, no matter how private or insignificant the suit. (This is evidenced by the fact that criminal contempt proceedings are typically prosecuted by the sovereign, not the private litigant.) In this respect every criminal contempt proceeding is actually (or at least potentially) a "suit or action brought or prosecuted in the name of, or on behalf of, the United States." Such a reading would, of course, make the statute a dead letter. It would bestow no "right" to a jury trial at all.

We are dealing here with a remedial statute broadly designed to afford the right to a jury trial in all but a narrowly limited category of contempts constituting violations of criminal statutes. Accordingly, the statute should be construed to effectuate its basic purpose, and its exemptions should not be unduly expanded by judicial construction. The Government concedes that the precise problem involved here—the United States entering a private litigation as *amicus curiae* and obtaining the order allegedly violated—"did not arise in the course of the legislative history." In my view, therefore, since a reading of the statute inclines against applying the exception here, and since there are no countervailing policy considerations, the statutory exemption should be read so as not to apply to the defendants.

The foregoing satisfies me that the alleged contempt was of an order of a District Court; that the alleged acts also constitute a criminal violation under an Act of Congress; that the relevant order was not entered in a suit or action brought or prosecuted in the name of, or on behalf of, the United States; and that, accordingly, defendants are entitled to a jury trial pursuant to 18 U. S. C. § 3691. Insofar as there may be lingering doubts concerning the application of that statute to the circumstances here, I would resolve those doubts in favor of the statutory right to a jury trial in order to avoid the grave constitutional questions inherent in the practice of punishing contempts such as the one here charged without trial by jury. Since the Court has not accepted this statutory analysis, I must consider these constitutional questions.

B. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The Court, in denying defendants' constitutional claim to a jury trial, rests on the history of criminal contempts relied on in its past decisions. The most recent of these decisions is *Green* v. *United States*, 356 U. S. 165,

which was decided by a closely divided Court.[7] The Court said:

> "The principle that criminal contempts of court are not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions." *Id.*, at 187.
>
> "Against this historical background [of the power to punish criminal contempts summarily at the time of the Constitution], this Court has never deviated from the view that the constitutional guarantee of trial by jury for 'crimes' and 'criminal prosecutions' was not intended to reach to criminal contempts." *Id.*, at 186.

A review of the original sources convinces me, however, that the history relied on by the decisions of this Court does not justify the relatively recent practice of imposing *serious* punishment for criminal contempts without a trial by jury. My research, which is confirmed by the authorities cited in the Appendix to the opinion of the Court, suggests the following explanation as to why criminal contempts were generally tried without a jury at the time of the Constitution: the penalties then authorized and imposed for criminal contempts were generally minor; and the courts were authorized to impose minor criminal penalties without a trial by jury for a variety of trivial offenses including, but not limited to, criminal contempts.

1. *Criminal Contempts at About the Time of the Constitution.*

In 1821, this Court recognized that there were "known and acknowledged limits of fine and imprisonment" for

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[7] In *Green* v. *United States*, 356 U. S. 165, "petitioners [did] not [contend] that they were entitled to a jury trial." *Id.*, at 187. The Court did, however, explicitly consider the issue.

criminal contempt. *Anderson* v. *Dunn*, 6 Wheat. 204, 228.[8] What these limits were at about the time of the Constitution can best be derived from the contemporary statutory and case law.

When the Bill of Rights was ratified, at least five of the original 13 States had specific statutory limitations on the punishment which could be imposed summarily for criminal contempts. The Connecticut statute permitting summary punishment for certain types of contempts contained a proviso "[t]hat no single minister of justice shall inflict any other punishment [for criminal contempt than] . . . putting them in the stocks, there to sit not exceeding two hours; or imposing a fine, not exceeding *five dollars.*"[9] (Emphasis in original.) The Delaware statute permitted a contemner to "be fined in any sum not exceeding Five Pounds"; it did not permit imprisonment for criminal contempt.[10] The Maryland statute per-

[8] See *United States* v. *Duane*, 25 Fed. Cas. 920, No. 14,997 (1801): "We confine ourselves within the ancient limits of the law [of criminal contempt], recently retraced by legislative provisions and judicial decisions." At 922.

[9] An Act Concerning Delinquents, May 1667, 1 Conn. Pub. Stat. Laws (1808), 231–232. The statute also permitted "imprisonment, binding to the peace or good behaviour to the next county court." *Id.*, at 231. (County courts met twice annually, see *id.*, at 208.) This was apparently a civil contempt sanction permitting imprisonment only until the contemptuous conduct terminated, limited in any event to about six months. The criminal contempt section was part of a more general title which permitted a judge to try "any matter of a criminal nature . . . where the penalty does not exceed the sum of *seven dollars.*" (Emphasis in original.) *Id.*, at 230.

[10] An Act against drunkenness, etc., apparently enacted in 1737. 1 Laws of Del. (1797), 173. The criminal contempt section is part of a general statute permitting trial without a jury for a number of petty offenses, *e. g.*, "drunkenness" (five shillings); "prophane cursing and swearing" (five shillings and three hours in the stocks); blasphemy (two hours in the pillory "and be branded in his or her forehead with the letter B, and be publicly whipt, on his or her bare back, with thirty-nine lashes well laid on"). *Id.*, at 173–174.

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mitted the court to hold the contemner "in close custody until the said process, rule or order, shall be fully performed . . ." (civil contempt), but it permitted no punishment "exceeding ten pounds current money." [11] The New Hampshire provision permitted imprisonment for contempt not exceeding 10 days and a fine "not to exceed ten pounds." [12] The South Carolina statute permitted a fine not exceeding 10 pounds for any contempt "by word or gesture," and a fine "at the discretion of the said court," for anyone who shall "strike or use any violence in the said courts"; [13] it did not permit imprisonment.[14]

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[11] Act of Nov. 1785, Chapter LXXII, I Md. Laws (Maxcy 1811), 595–596.

[12] Act of Feb. 9, 1791, N. H. Constitution and Laws (1805), 95. See *id.*, at 9. See also N. H. Acts and Laws (1696–1725), 15.

[13] Act of 1731, No. 552, Grimke's Laws of South Carolina (1790), 129. It is unclear whether this discretion was limited by decisional or statutory law.

[14] Although finding no general statutory limitation on the punishment which could be imposed for criminal contempt in Massachusetts, I have found the following data which suggest that the punishments there imposed were probably not out of line with those imposed in the other Colonies. See 1 Mass. Acts and Resolves (1692–1714), 282–283, Act of June 18, 1697, limiting to 10 shillings the punishment which could be imposed by a justice of the peace for criminal contempt in refusing to obey a summons; *id.*, at 335, Act of June 22, 1698, limiting to 40 shillings the punishment which any court could impose upon jurors who refused to obey a summons; *id.*, at 354–355, Act of Dec. 10, 1698, limiting to 40 shillings (or imprisonment for 48 hours, or "by setting in the stocks not exceeding four hours") the punishment for disobeying the order of a justice of the peace to assist in apprehending an offender. See also *Case of John Matthews*, cited in Colonial Justice in Western Massachusetts (1639–1702): The Pynchon Court Record (1961), 243 (fine of five shillings for "refusinge to obey a summons"; "contemptuous and high carriage"; "commanding [the server of the summons] off his ground and holding up his sickle at him . . ."); *Case of Samuell Fellowes*, *id.*, at 271 (1671) (fine of five pounds for "contemptuous carriage in Corte");

Within a short time after the ratification of the Bill of Rights other States enacted statutes containing specific limitations on the punishments which could be imposed summarily for criminal contempts. These statutes, which appear to be codifications of existing practices and court decisions rather than newly created legislative limita-

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Case of James Carver, id., at 288 (1678) (fine of 60 shillings for "horible abusive Cariage," including threats, striking the constable with his fist and "saying he would kill him and beate out his Braines etc."). But see *Thwing* v. *Dennie*, Quincy's Reports (Mass. 1761–1772), 338 (committed to prison for a period of time not specified in the court's opinion for "in a most savage Manner attempt[ing] to snatch" papers from the hands of his courtroom opponent, thereby tearing some essential documents); Act of Oct. 20, 1663, Mass. Colonial Laws (1672), 133, relating to the payment of fines for "Prophanation of the Sabbath, Contempt or Neglect of Gods publick Worship." The Act provides that: "in case any person or persons so sentenced, do neglect or refuse to pay such Fine or Mulcts as shall be legally imposed on them, or give Security in Court . . . every such person or persons so refusing or neglecting to submit to the Courts Sentence, shall for such his Contempt be Corporally punished, according as the Court that hath cognizance of the case shall determine: And where any are Corporally punished, their fines shall be remitted." Compare the penalties sometimes imposed by the "Court" of Assistants of Massachusetts Bay Colony, which was a legislative and executive body as well as a judicial tribunal (cases cited in the Appendix to the opinion of the Court, *ante*, at 711–712).

Although finding no colonial statute designating the punishment for criminal contempt in Maine, I have found a rule of court promulgated in 1649 which states that contemners "shalbe fined according unto the discretion of the Court." 1 Maine Province and Court Records 137. I have found no rule permitting imprisonment for criminal contempt.

In 1647, the Rhode Island General Assembly enacted a statute prohibiting the "use [of] words of contempt against a chief officer, especially in the execution of his office . . . ." The penalty for this offense was being "bound to his good behavior, so to remain for three months space, or the next court following." Trial was by a jury of "his peers," and not by summary proceeding. R. I. Code of Laws (1647) 24. Cf. *id.*, at 52.

tions,[15] shed additional light on the practice at about the time of the Constitution.

The New Jersey statute permitted a contemner to be punished by a fine "not exceeding fifty dollars." [16] The

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[15] See, *e. g.*, *Case of Theunis Thew* (N. Y. Supreme Court, 1763), in Goebel and Naughton, Law Enforcement in Colonial New York (1944), 243 (fine of 200 pounds for contempt in refusing to answer questions); *Case of William Dobbs and William Paulding* (N. Y. Supreme Court, 1764), *ibid.* (fine of 200 pounds for contempt in refusing to answer questions); *Case of John Mosier* (Suffolk Court of Oyer and Terminer, 1717), *id.*, at 606 ("John Mosier [was ordered to be] committed into ye sheriffs Custody and to suffer a weeks Imprisonment for affronting the Kings Justices in Going to Hold court." He was released, however, the following day); *King* v. *Mary Richardson* (N. Y. Kings County Court, 1693), *id.*, at 605 (unspecified fine for unspecified contempt); *King* v. *Tiebout* (N. Y. Court of Quarter Sessions, 1695), *ibid.* (unspecified fine for unspecified contempt); *Case of John Tenbroek* (N. Y. Supreme Court, 1729), *id.*, at 606 (fine of 10 pounds for contempt in "having privately given victuals to the jury"); *Feree* v. *Strome*, 1 Yeates 303 (Pa. 1793) ("reprimanded . . . [and] dismissed without any fine" for failing to respond to subpoena); *Respublica* v. *Oswald*, 1 Dall. 343 (Pa. 1788) (imprisonment for one month and fine of 10 pounds for contempt by publication); *Territory* v. *Thierry*, 1 Martin 55 (La. 1810) (imprisonment for 10 days and fine of $50 for "grossly and indecently abusive" contempt by publication); *State* v. *Noel*, T. U. P. Charlton's Reports 43, 65 (Ga. 1806) (fines of $50 and $10 for "contempts in disobeying the order of" the Superior Court); *Case of Priest and Bonet* (1702), cited in Scott, Criminal Law in Colonial Virginia (1930), 173 (three hours in stocks for fighting near the court); *Case of Thomas Smith* (1697), *ibid.* (one hour in stocks for threatening the foreman of a jury); *Case of Matthew Kelley* (1773), *id.*, at 174 (fined five pounds for refusal to obey a warrant); *Case of Mary Russell* (Oct. 6, 1703), cited in *id.*, at 172 (ordered to jail until she gave bond for future good behavior for claiming that she had "received as little justice as she would have in hell with the devil sitting as judge"); *State* v. *Stone*, 3 Harris and McHenry's Reports (Md. 1792), 115 (fine of 20 shillings against

[*Footnote 16 is on p. 745*]

Kentucky statute specified that "[n]o court or judge shall, for any contempt against such court or judge, pass judgment for, decree, order or inflict, or cause to be inflicted,

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a lower court judge for refusing to obey the mandate of a higher court); *State* v. *Keene*, 11 La. 596, 601 (fine of $50 and imprisonment "during the space of ten days," for a contempt described by the court in the following terms: "We do not remember a case of grosser contempt, and we doubt whether any are to be found in the books." The annotation of the official court reporter states that "The maximum punishment for a contempt of court, committed by a party to a suit, is ten days imprisonment, and a fine of fifty dollars and the costs." *Id.*, at 596). *Monroe* v. *Harkness*, 1 Cranch C. C. (1803), 157–158 (imprisonment for six days for violating an injunction); *United States* v. *Caton*, 25 Fed. Cas. 350, No. 14,758 (1803) (fine of $5 and ordered to give security of $100 for his good behavior, for refusing to answer questions, behaving in an "insolent manner," and threatening "some of the grand jurors"); *Case of John Rousby*, Proceedings of the Provincial Court of Md. (1675), Arch. of Md. LXV 585 (fine of 100 pounds of tobacco for contemptuous speech by an attorney in court); *Case of John Cherman*, Proceedings of the Charles County Court of Md. (1660), Arch. of Md. LIII 84 (fine of 10 pounds of tobacco for contempt in "Prophainly takinge the name of god in vaine in Open Courte"); *Case of Jon Seybrey*, Proceedings of the Chancery Court of Md. (1669), Arch. of Md. LI 8 (fine of 12 shillings, sixpence for failure to respond to summons); *Case of Lewis Morrice* (New Jersey Court of Common Right, 1698), I Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702, 311 (fine of 50 pounds for resisting arrest and denying the authority of the court); *United States* v. *Duane*, 25 Fed. Cas. 920, No. 14,997 (1801) (imprisonment for 30 days for aggravated contempt by publication); *United States* v. *Emerson*, 25 Fed. Cas. 1012, No. 15,050 (1831) (fine of $5 for fighting and shouting in court); *United States* v. *Carter*, 25 Fed. Cas. 313, No. 14,740 (1829) (fine of $1 for threatening a witness); *Weiberg* v. *The St. Oloff*, 29 Fed. Cas. 591, No. 17,357 (1790) (fine of $20 for "refusing to obey the process of the court, and in confining in irons a suitor whilst under the protection of the laws . . ."). See also additional authority cited in the Appendix to the opinion of the Court.

[16] Act of June 13, 1799, Elmer, Digest of N. J. Laws (1838), 59.

any fine exceeding the sum of ten pounds, nor any imprisonment exceeding one day, *without the trial by jury to assess the quantity of such fine, and determine the duration of such imprisonment.*" [17] The Pennsylvania statute permitted an unspecified fine and if the contemner "shall be unable to pay such fine, such person may be committed to prison by the court for any time not exceeding three months." [18] The New York statute permitted a maximum fine of $250 and imprisonment for 30 days in summary proceedings for criminal contempts.[19]

The Alabama criminal contempt statute declared that:

> "*whereas,* the trial by jury in all penal, as well as criminal cases, is both a safe and adequate mode of investigation and decision, and should only be suspended in cases of absolute necessity. *Be it enacted,* that no court shall, for any contempt against such court, . . . inflict . . . any fine exceeding the sum of twenty dollars, nor any imprisonment exceeding twenty-four hours, without the trial by jury, to assess the amount of such fine, and determine the duration of such imprisonment." [20]

The Virginia statute was quite detailed. It contained the following proviso:

> "That no court shall, without the intervention of a jury, for any such contempt of misbehaviour in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice

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[17] Act of Dec. 19, 1793, 1 Digest of the Stats. of Ky. (1822), 301. (Emphasis added.)

[18] Act of Apr. 3, 1809, Laws of Pa. (1808–1812), 55–56.

[19] N. Y. Rev. Stats. (1829), 276, 278. More extensive punishment was permitted upon indictment and trial by jury.

[20] Territorial Act of 1807, Aikin's Digest of the Laws of Ala. (1833–1835 Supp.), 87–88.

> therein, impose any fine on any person or persons, exceeding fifty dollars, or commit him, her or them, for a longer period than ten days: *And provided,* That in any case of aggravated contempt . . . , the court may impannel a jury, without any indictment, information or pleadings, in a summary manner, to ascertain the amount of fine or term of imprisonment, proper to be inflicted for such offence, and may impose the fine or imprisonment ascertained by the jury in manner aforesaid." [21]

The laws of other States similarly limited the maximum penalties which could be imposed summarily for criminal contempts.[22]

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[21] Act of Apr. 16, 1831, Supp. to the Rev. Code of Va. (1833), 144. The Appendix to the opinion of the Court correctly notes that the punishment sanctioned for other categories of contempt within this statute—violence or threats of violence to judges, witnesses or jurors, misbehavior of court officers, and disobedience of a court order—was not specifically limited. *Ante,* at 723.

At the time of the enactment of this and similar statutes, there were generally no factual disputes for resolution by a jury in criminal contempt cases; for if the alleged contemner denied under oath the factual allegations against him, the contempt charge was dismissed, and he was subject to indictment for perjury. See, *e. g.,* Curtis and Curtis, The Story of a Notion in the Law of Criminal Contempt, 41 Harv. L. Rev. 51, 63–64; 4 Blackstone, Commentaries, 288; *Wells* v. *Commonwealth,* 21 Grattan's Rep. (Va. 1871), 500.

"Contempt of court was sharply reproved [in Colonial Virginia]. The least that was required was an open apology, and the court often added a fine, or commitment to prison, usually to last until bond for good behavior was furnished. Sometimes an hour or two in the stocks was prescribed." Scott, Criminal Law in Colonial Virginia (1930), 171–172.

[22] *E. g.,* Rev. Stats. of Mich. (1846), Tit. XXI, c. 96, pp. 428–430 (30 days' imprisonment, $250 fine); Chase, Stats. of Ohio (1788–1833), c. 823, §§ 49, 53, pp. 1701–1702 (fine of $200); Iowa Code (1850–1851), Tit. 18, c. 94, § 1600, p. 237 (one day's imprisonment, $50 fine); Wis. Rev. Stats. (1849), c. 87, § 8, p. 439 (30 days' im-

The available evidence of the practice in criminal contempt cases also suggests that punishments were trivial.[23] This practice was described by Chief Justice Kent in 1809 as follows: "There is no such thing as an abuse of this power in modern times. The case probably is not to be found. An alarm cannot be excited at its existence, in the extent now laid down. . . . The tendency of the times, is rather to induce the courts to relax, than increase in the severity of their ancient discipline, to exercise their power over contempts with extreme moderation . . . ." *In the case of John V. N. Yates*, 4 Johnson's Rep. (N. Y. 1809) 317, 375–376. And, in 1916, the Supreme Court of Iowa summarized a century

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prisonment, $250 fine); Mo. Rev. Stats. (1835), Act of Mar. 7, 1835, § 58, p. 160 (10 days' imprisonment, $50 fine); Minn. Terr. Rev. Stats. (1851), c. 92, § 12, p. 456 (six months' imprisonment, $250 fine); Miss. Stats. (1840), c. 40, § 26, p. 486 (imprisonment during "the term of the court at which the contempt shall have been committed"; courts held two terms annually; $100 fine); Thomson's Digest of the Laws of Fla. (1847), 3d Div., Tit. I, c. 1, § 2, p. 321 (30 days' imprisonment, $100 fine); Ark. Stats. (1837), c. 43, § 38, pp. 234–235 (10 days' imprisonment, $50 fine); Battle's Revisal, Pub. Stats. of N. C. (1873), Act of 1868, c. 24, § 2, p. 257 (imprisonment for 30 days, fine of $250); Laws of Vt. (1824), Act of Nov. 11, 1818, c. 31, § 27, p. 259 (fine of $200).

Cf. Georgia Stats. (Feb. 1799), an Act to amend an Act, entitled "An act to revise and amend the Judiciary System of this State," § 26, p. 30, limiting the punishment which courts may impose "in case of a jury committing a contempt" to "a sum not exceeding one hundred dollars." See also § 20, p. 26, providing for "an attachment against . . . defaulting witness" and limiting the punishment to $300. See also Georgia Stats. (1851) 647, Act of Dec. 14, 1811, § XXVII, limiting the punishment which could be imposed by justices of the peace for criminal contempts to "any sum not exceeding $2, or imprisonment for a term not exceeding two days for each offence . . . ."

[23] See, *e. g.*, cases cited, *supra*, note 14.

and a quarter of practice in criminal contempt cases in the following terms:

> "The authorities may be searched in vain for any precedent under our constitutional form of government holding it to be in the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt, or in any proceeding whatever other than the orderly process of trial . . . ." *Flannagan* v. *Jepson,* 177 Iowa 393, 400, 158 N. W. 641, 643–644.

2. *Petty Offenses at About the Time of the Constitution.*

This Court has recognized that:

> "At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction." *District of Columbia* v. *Clawans,* 300 U. S. 617, 624.

New Jersey statutes, for example, permitted trial by a judge for offenses such as "profanely swearing" (punishable by a fine of "one half of a dollar," four hours in the stocks, or four days in the "common gaol"); "excessive use of spirituous, vinous, or other strong liquor" (fine of one dollar, four hours in the stocks, or four days in "gaol");[24] and disorderly conduct (three months in the workhouse).[25] In New York, trial by jury was not

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[24] Elmer's Digest of N. J. Law (1838), Act of Mar. 16, 1798, §§ 8–11, pp. 588, 589.

[25] Paterson's Laws of N. J. (1800) 410. See also *id.,* at 329, 333.

required for offenses such as unlicensed practice by a physician (fine of five pounds);[26] offering copper coins of known inferior quality or weight (fine of six pounds or five times the value of the coins, whichever is less);[27] "drunkenness or swearing" (fine of three shillings or four hours in the stocks);[28] and false pretenses (imprisonment for six months).[29] Maryland statutes permitted trial by a judge for offenses such as refusal by the mother of a bastard child to "discover" the father (fine of 30 shillings),[30] and disorderly conduct (three months in the workhouse).[31] Virginia permitted summary punishment for offenses ranging from improper issuing of notes (fine of 25 shillings)[32] to disorderly conduct (20 lashes and three months' imprisonment).[33]

This history has led the Court to conclude that "the intent [of the Framers] was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Schick* v. *United States*, 195 U. S. 65, 70. It has similarly led the Court to conclude that "[e]xcept in that class or grade of offences called petty offences . . . the guarantee of an impartial jury to the accused in a criminal prosecution . . . secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged," *Callan* v. *Wilson*, 127 U. S. 540, 557, and that "the severity of the penalty" must be considered in determining whether a violation of law, "in other respects trivial and not a crime

[26] 4 Colonial Laws of N. Y. (1760) 455.

[27] 1787 Laws (N. Y.), c. 97.

[28] 1 Colonial Laws of N. Y. (1708) 617.

[29] 1785 Laws (N. Y.), cc. 31, 40, 47.

[30] 1752 Md. Sess. Laws, 5.

[31] 1785 Md. Sess. Laws, c. 15, § 15.

[32] Act of Oct. 1777, c. 24, § 2.

[33] 1785 Va. Stats. (Oct. Sess.), c. 1, § 8; c. 4, § 3; c. 59; 1787 Va. Stats. (Oct. Sess.), c. 48, § 13.

at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution." *District of Columbia* v. *Clawans,* 300 U. S. 617, 625.

3. *Criminal Contempt in Recent Years.*

There has been a dramatic increase in recent years in the severity of the punishment imposed in the federal courts without trial by jury for criminal contempt. For example, in *Green* v. *United States, supra,* and *Collins* v. *United States,* 269 F. 2d 745, sentences of imprisonment for three years were imposed; in *Piemonte* v. *United States,* 367 U. S. 556, a sentence of imprisonment for 18 months was imposed; in *Brown* v. *United States,* 359 U. S. 41, a sentence of imprisonment for 15 months was imposed; in *Nilva* v. *United States,* 352 U. S. 385, a sentence of imprisonment for one year and one day was imposed; and in *Levine* v. *United States,* 362 U. S. 610, a sentence of imprisonment for one year was imposed.

4. *Historical Conclusions.*

The available evidence seems to indicate that (a) at the time of the Constitution criminal contempts triable without a jury were generally punishable by trivial penalties, and that (b) at the time of the Constitution all types of "petty" offenses punishable by trivial penalties were generally triable without a jury. This history justifies the imposition without trial by jury of no more than trivial penalties for criminal contempts. The Court, in light of the history reviewed here and in the Appendix to the opinion of the Court, has failed sufficiently to take into account the possibility that one significant reason why criminal contempts were tried without a jury at the time of the Constitution was because they were

deemed a species of petty offense punishable by trivial penalties.[34] Since criminal contempts, as they are now punished, can no longer be deemed a species of petty offense punishable by trivial penalties, defendants' constitutional claim to trial by jury should not be denied on the authority of the history of criminal contempt at the time of the Constitution nor on the authority of the past decisions of this Court which relied on that history.[35]

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[34] See *Green* v. *United States*, 356 U. S. 165, 209–210 (dissenting opinion of MR. JUSTICE BLACK):

"I find it difficult to understand how it can be maintained that the same people who manifested such great concern for trial by jury as to explicitly embed it in the Constitution for every $20 civil suit could have intended that this cherished method of trial should not be available to those threatened with long imprisonment for the crime of contempt. I am confident that if there had been any inkling that the federal courts established under the Constitution could impose heavy penalties, as they now do, for violation of their sweeping and far-ranging mandates without giving the accused a fair trial by his fellow citizens it would have provoked a storm of protest, to put it mildly. Would any friend of the Constitution have been foolhardy enough to take the floor of the ratifying convention in Virginia or any of a half dozen other States and even suggest such a possibility?"

[35] The "historical error" on which the imposition of serious penalties for criminal contempts without a jury trial rests is not of the same character or duration as the "historical error" discussed in *Green* v. *United States, supra*, at 185, 190, 202. There the alleged "error" occurred before the adoption of the Constitution and has been a part of English and American law for almost two centuries. The Court was not prepared to overturn "at least two score cases in this Court." *Id.*, at 190. Here the "error" has only recently become manifest and has never been explicitly legitimated by this Court.

The imposition of serious penalties for criminal contempts is a relatively recent phenomenon. From the foundation of the Republic until 1957 I am aware of only two isolated instances of imprisonment for longer than six months for criminal contempt brought to the attention of this Court. *In re Savin*, 131 U. S. 267 (one year); *Hill* v. *United States ex rel. Weiner*, 300 U. S. 105 (two years). Since

Their claim should be evaluated by analyzing the real nature of criminal contempts and applying the policy of the constitutional requirement of trial by jury in "all crimes" and "all criminal prosecutions." [36]

5. *The Nature of Criminal Contempts and the Policy of Trial by Jury.*

I wish to make it clear that I am not here concerned with, nor do I question, the power of the courts to com-

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1957, however, our attention has been called to at least six instances where imprisonment of a year or more was imposed. *Nilva* v. *United States*, 352 U. S. 385 (one year and one day); *Yates* v. *United States*, 355 U. S. 66 (one year); *Green* v. *United States*, 356 U. S. 165 (three years); *Brown* v. *United States*, 359 U. S. 41 (15 months); *Levine* v. *United States*, 362 U. S. 610 (one year); *Piemonte* v. *United States*, 367 U. S. 556 (18 months). By holding that no nontrivial penalty may be imposed for criminal contempt without a trial by jury, we would be correcting a fundamental, but only recently manifested, historical error.

[36] An analogous situation is presented by the criminal enforcement of the laws relating to the sale and taxation of liquor. At the time of the Constitution violations of the liquor laws of the various States generally carried with them trivial penalties and were deemed petty offenses, triable without a jury. *E. g.*, failure to pay tax, see Pa. Laws of 1712–1713, c. 195, § 2 (five-pound fine); Pa. Laws of 1719, c. 239, § 4 (20-shilling fine); 1756 Md. Sess. Laws, 12 (20-pound fine); unlicensed sale of liquor, see New York Laws of 1781, c. 27 (10-pound fine); 1757 Md. Sess. Laws, 6 (30-shilling fine); selling liquor above price fixed, see Pa. Laws of 1718, c. 235 (40-shilling fine); selling liquor to minors or slaves, see Pa. Laws of 1721, c. 244, § 3 (five-pound fine for third offense); Md. Laws 1735, Arch. of Md. XXXIX 292 (10-shilling fine); or at prohibited places, see 4 Colonial Laws of New York (1768), c. 1380 (five-pound fine). Now, however, violations of at least some liquor laws are punished so severely that they cannot be deemed trivial offenses. Certainly no one would argue that it is constitutionally permissible to impose without trial by jury severe punishments for violation of these laws simply because trivial punishments were imposed without trial by jury at the time of the Constitution for violation of similar or even identical laws. See *District of Columbia* v. *Clawans*, 300 U. S. 617, 625.

pel compliance with their lawful orders by the imposition of conditional punishment—commonly referred to as civil contempt. In such cases, it may be said that "the defendant carries the keys to freedom in his willingness to comply with the court's directive. . . ." [37] Nor am I here concerned with the imposition of the trivial punishments traditionally deemed sufficient for maintaining order in the courtroom. Cf. *Ungar* v. *Sarafite, ante,* p. 575. I am concerned solely with the imposition, without trial by jury, of fixed nontrivial punishments *after* compliance with the court's order has been secured.

Thus limited, criminal contempts are not essentially different from other "crimes" or "criminal prosecutions." In each case punishment is imposed for a past violation of a mandate of a coordinate organ of government:[38]

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[37] "Such coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees. See *United States* v. *United Mine Workers of America,* 330 U. S. 258, 330–332 (dissenting and concurring opinion). Instead, at stake here is the validity of a criminal conviction for disobedience of a court order punished by a long, fixed term of imprisonment. In my judgment the distinction between conditional confinement to compel future performance and unconditional imprisonment designed to punish past transgressions is crucial, analytically as well as historically, in determining the permissible mode of trial under the Constitution." *Green* v. *United States, supra,* at 197–198 (dissenting opinion of MR. JUSTICE BLACK). But see Goldfarb, The Contempt Power (1963), 49–67.

[38] "Under the Constitution courts are merely one of the coordinate agencies which hold and exercise governmental power. Their decrees are simply another form of sovereign directive aimed at guiding the citizen's activity. I can perceive nothing which places these decrees on any higher or different plane than the laws of Congress or the regulations of the Executive insofar as punishment for their violation is concerned. . . . Unfortunately judges and lawyers have told each

criminal contempt involves punishment for violation of an order of a court; "crime" involves punishment for violation of a statute enacted by a legislature.[39] I can see no greater need for certain and prompt punishment for the former than for the latter.[40]

It may be true that a judge can dispose of a charge of criminal contempt, or any other criminal charge, more expeditiously and more cheaply than a jury.

> "But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy." *Green* v. *United States, supra,* at 216.

Nor are criminal contempts substantially different from other crimes when measured by the "tests traditionally applied to determine whether [a given sanction] is penal or regulatory in character . . . ." *Kennedy* v.

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other the contrary so often that they have come to accept it as the gospel truth." *Green* v. *United States, supra,* at 218–219 (dissenting opinion of MR. JUSTICE BLACK).

[39] In this case defendants' conduct is alleged to be a violation of both a court order and a legislative enactment.

[40] "I would go as far as any man in favor of the sharpest and most summary *enforcement* of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 425–426 (dissenting opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis). (Emphasis added.)

Mendoza-Martinez, 372 U. S. 144, 168. In the *Mendoza-Martinez* case, the tests were enumerated in the following terms:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Id.*, at 168–169.

Criminal contempt, when punished by a nontrivial penalty, certainly "involves an affirmative disability or restraint" under any reasonable definition of these terms. The sanction imposed for criminal contempt has always been "regarded as a punishment" designed to deter future defiances of the court's authority and to vindicate its dignity.[41] No "alternative purpose" has been suggested to justify its existence. *Scienter* is generally required to support a charge of criminal contempt.[42] And the behavior to which a charge of criminal contempt applies is generally "already a crime." [43]

In my view, therefore, there is no justification, either in the history or policy of criminal contempt or in the history or policy of the Constitution, for treating criminal contempt differently from other "crimes" or "criminal prosecutions." If a criminal contempt (or any other

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[41] See, *e. g.*, 4 Blackstone, Commentaries, pp. 283–285.

[42] See, *e. g.*, *In re Rice*, 181 F. 217. *Scienter* was charged in this case, see Appendix A, *infra*, at 761.

[43] The behavior with which defendants are here charged is already a crime. *Ante*, at 729, 735–736.

violation of law) is punishable only by a trivial penalty, then the Constitution does not require trial by jury. If a violation of law is punishable by a nontrivial penalty, then the Constitution does require trial by jury whether the violation is labeled criminal contempt or anything else.[44]

C. APPLICATION OF THE CONSTITUTIONAL RULE TO THE FACTS OF THIS CASE.

It remains only to apply this conclusion to the facts here. Although the certified question does not specify

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[44] I need not at this juncture consider what constitutes a trivial penalty. The Court considered this problem in *District of Columbia* v. *Clawans*, 300 U. S. 617. Respondent there was sentenced "to pay a fine of $300 or to be confined in jail for sixty days" for engaging in the business of selling secondhand property without a license, an offense "punishable by a fine of not more than $300 or imprisonment for not more than ninety days." *Id.*, at 623. The United States Court of Appeals for the District of Columbia in a unanimous *en banc* decision, noted that "[i]f, instead of three months in jail, the punishment provided were six months or a year, the problem would be simpler. So, also, if the punishment were, let us say, ten days in jail." It held, however, that imprisonment for three months "cannot be said to be petty or trivial." 66 App. D. C. 11, 14, 84 F. 2d 265, 268. That decision was reversed by a divided Supreme Court. The Court said: "[W]e may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much." 300 U. S., at 627–628. The Court also cautioned:

"We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted." *Id.*, at 627.

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the severity of the punishment which could be imposed upon the defendants if the allegations against them are proved, it would defy reality to assume that the contempt with which they are charged is a "trivial" one punishable by a minor penalty. The Solicitor General of the United States described the nature of the contempt to this Court in oral argument in the following words:

> "[T]he Governor and Lieutenant Governor of a State sought to array the whole panoply of the State against a final adjudication by the federal courts. The contempt with which they are charged was rioting, loss of life, and the need for federal troops to uphold the law of the land . . . ."

One judge in the Court of Appeals said: "Never before has such a charge been brought by or in a Court of Appeals . . . against either a state officer or a private citizen." [45] The certified question indicates that "the acts charged as constituting the alleged disobedience were of a character as to constitute also a criminal offense . . . ," punishable by imprisonment for a year. 18 U. S. C. (Supp. IV) § 1509. Another judge in the Court of Appeals said that: "Respondents are charged with what amounts to a crime." 330 F. 2d, at 432. These indicia, taken together with the severity of the sanction imposed in the civil contempt case which grew out of the same conduct,[46] compel the conclusion that the contempt here charged was not "trivial." It was extraordinarily serious, among the most serious in this Nation's history. If Green's contempt—jumping bail—was punishable by im-

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[45] 330 F. 2d 369, 393.

[46] The civil contempt judgment provided for a fine of $10,000 a day against Governer Barnett and $5,000 a day against Lieutenant Governor Johnson unless they complied with the court's order by a certain fixed time.

prisonment for three years, and if Piemonte's contempt—refusal to answer a question before a grand jury—was punishable for imprisonment for a year and a half,[47] it would be wholly unrealistic for us to assume that under the standards of punishment sanctioned by this Court in the past the present contempt may be characterized as a petty offense punishable by no more than a trivial penalty.[48] For these reasons, I would answer the certified question in the affirmative and remand the case to the District Court so that the accused may be tried by a jury and receive at a trial all the safeguards which our Constitution affords a criminal defendant.

In sum, therefore, I conclude that defendants' trial should be by a jury. This would accord with the basic policy of Congress, that contempts which are also crimes should be tried by a jury. And it would accord with the fundamental policy of the Constitution, that contempts which are punishable as crimes must be tried by a jury.[49]

I reject the Government's "necessity" argument, that "[t]he independence of the federal courts . . . would be seriously undermined if their orders could be nullified by an unsympathetic jury." That is but another way of putting the oft-rejected assertion against trial by jury, that some guilty men may be acquitted. This possibility, however, is the price we have chosen to pay for our cher-

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[47] See *Green* v. *United States, supra,* and *Piemonte* v. *United States, supra.*

[48] The right to trial by jury depends not on the severity of the punishment actually imposed, but rather on the severity of the punishment which could legally have been imposed. *District of Columbia* v. *Clawans,* 300 U. S. 617, 623.

[49] An answer to the certified question does not prevent defendants, if they are convicted, from raising other issues, not included in the certificate, on appeal from their convictions.

ished liberties. "The imperative necessity for safeguarding these rights . . . under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." *Kennedy* v. *Mendoza-Martinez*, 372 U. S., at 165. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 4 Wall. 2, 120–121.

APPENDIX A TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

COURT OF APPEALS' ORDER TO SHOW CAUSE.

This Court having entered an order on September 18, 1962, in the case of *James H. Meredith, et al* v. *Charles Dickson Fair, et al*, No. 19475, designating and authorizing the United States to appear and participate in that case as amicus curiae with the right to submit pleadings, evidence, arguments and briefs, and to initiate such further proceedings, including proceedings for injunctive relief, as might be appropriate in order to maintain and preserve the due administration of justice and the integrity of the judicial processes of the United States, and

The Attorney General having instituted, pursuant to this Court's order of September 18, 1962, an action in the name of and on behalf of the United States, as amicus curiae, which action was entitled *United States* v. *State of Mississippi, et al*, restraining the State of Mississippi and Ross R. Barnett, their agents, employees, officers, successors, and all persons in active concert or participa-

tion with them, from interfering with or obstructing the enjoyment of rights or the performance of duties under the order of this Court of July 28, 1962, in the case of *Meredith* v. *Fair*, and a similar order of the District Court for the Southern District of Mississippi in that case, requiring the enrollment of James H. Meredith at the University of Mississippi, and

This Court having ordered on November 15, 1962, that the Attorney General, and such attorneys in the Department of Justice as he may designate, be appointed to institute and prosecute criminal contempt proceedings against Ross R. Barnett and Paul B. Johnson, Jr., and

Probable cause having been made to appear from the application of the Attorney General filed December 21, 1962, in the name of and on behalf of the United States that on September 25, 1962, Ross R. Barnett, having been served with and having actual notice of this Court's temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the offices of the Board of Trustees of the University of Mississippi in Jackson, Mississippi, and thereby deliberately prevented James H. Meredith from enrolling as a student in the University pursuant to this Court's order of July 28, 1962; that on September 26, 1962, Paul B. Johnson, Jr., acting under the authorization and direction of Ross R. Barnett, and as his agent and as an agent and officer of the State of Mississippi, and while having actual notice of the temporary restraining order of September 25, 1962, wilfully prevented James H. Meredith from entering the campus of the University of Mississippi in Oxford, Mississippi, and thereby deliberately prevented James H. Meredith from enrolling as a student in the University pursuant to the orders of this Court; that on September 27, 1962, Ross R. Barnett and Paul B. Johnson, Jr. wilfully failed to take such measures as were necessary to main-

tain law and order upon the campus of the University of Mississippi and did, instead, direct and encourage certain members of the Mississippi Highway Safety Patrol, Sheriffs and deputy Sheriffs and other officials of the State of Mississippi to obstruct and prevent the entry of James H. Meredith upon the campus of the University that day; that on September 30, 1962, Ross R. Barnett, knowing of the planned entry of James H. Meredith upon the campus of the University of Mississippi, knowing that disorders and disturbances had attended and would attend such entry, and knowing that any failure of the Mississippi Highway Safety Patrol to take all possible measures for the maintenance of peace and order upon the campus could and would result in interferences with and obstructions to the carrying out of the Court's order of July 28, 1962, wilfully failed to exercise his responsibility, authority, and influence as Governor to maintain law and order upon the campus of the University of Mississippi; and that all of said acts, omissions and conduct of Ross R. Barnett and Paul B. Johnson, Jr., were for the purpose of preventing compliance with this Court's order of July 28, 1962, and of the similar order of the United States District Court for the Southern District of Mississippi, entered on September 13, 1962, and were in wilful disobedience and defiance of the temporary restraining order of this Court entered on September 25, 1962,

IT IS ORDERED that Ross R. Barnett and Paul B. Johnson, Jr., appear before this Court in the courtroom of the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, on February 8, 1963, at 9:30 o'clock a. m., to show cause, if any they have, why they should not be held in criminal contempt, and should either of them at said time and place show such cause, either by pleading not guilty to the charges contained in the application of the United States, or by other means,

he shall thereafter appear before this Court for hearing upon said charges at a time and place to be fixed by the Court.

This 4th day of January, 1963.

ELBERT P. TUTTLE
RICHARD T. RIVES
WARREN L. JONES
JOHN R. BROWN
JOHN MINOR WISDOM
GRIFFIN B. BELL
United States Circuit Judges
Fifth Circuit

I Dissent—BEN F. CAMERON
United States Circuit
Judge, Fifth Circuit

I Dissent—WALTER P. GEWIN
United States Circuit
Judge, Fifth Circuit

APPENDIX B TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

COURT OF APPEALS' INJUNCTION ORDER.

This Court on July 26, 1962 entered its opinion and judgment forthwith (1) vacating a stay issued herein by Judge Ben F. Cameron, July 18, 1962, (2) recalling its mandate issued herein July 17, 1962, (3) amending and reissuing its mandate, for the purpose of preventing an injustice, by ordering the District Court to issue forthwith an injunction against the defendants-appellees ordering the immediate admission of the plaintiff-appellant, James H. Meredith, to the University of Mississippi, (4) which opinion and judgment includes an order of in-

junction by this Court against the defendants-appellees herein.

Now therefore, the following injunctive order is issued:

ORDER

Pending such time as the District Court has issued and enforced the orders herein required and until such time as there has been full and actual compliance in good faith with each and all of said orders by the actual admission of plaintiff-appellant to, and the continued attendance thereafter at the University of Mississippi on the same basis as other students who attend the University, the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree are expressly:

(1) Ordered to admit the plaintiff, James H. Meredith, to the University of Mississippi, on the same basis as other students at the University, under his applications heretofore filed, which are declared to be continuing applications, such admission to be immediate or, because of the second summer session having started, such admission to be in September, at Meredith's option, and without further registration,

(2) Prohibited from any act of discrimination relating to Meredith's admission and continued attendance, and is

(3) Ordered promptly to evaluate and approve Meredith's credits without discrimination and on a reasonable basis in keeping with the standards applicable to transfers to the University of Mississippi.

In aid of this Court's jurisdiction and in order to preserve the effectiveness of its judgment, this Court entered a preliminary injunction on June 12, 1962. The injunc-

tion was against Paul G. Alexander, Attorney for Hinds County, Mississippi, his agent, employees, successors, and all persons in active concert and participation with him and all persons who received notice of the issuance of the order, restraining and enjoining each and all of them from proceeding with the criminal action instituted against James H. Meredith in the Justice of the Peace Court of Hinds County, Justice District No. 5, or any other court of the State of Mississippi, charging that Meredith knowingly secured his registration as a voter in Hinds County but was a resident of Attala County, Mississippi. In further aid of this Court's jurisdiction and in order to preserve the continued effectiveness of its judgment and orders, the said preliminary injunction is continued against the same parties and all other parties having knowledge of this decree pending the final action of the United States Supreme Court if and when the defendants-appellees should apply for a writ of certiorari or for any other appropriate action in this cause by the United States Supreme Court.

It is further ordered that a copy of this order be served upon the defendants-appellees, through their attorneys, and upon Paul G. Alexander, County Attorney for Hinds County, Mississippi, and Joseph T. Patterson, Attorney General for the State of Mississippi.

Entered at New Orleans, Louisiana
this 28th day of July, 1962.

JOHN R. BROWN, JMW
United States Circuit Judge

JOHN MINOR WISDOM
United States Circuit Judge

DOZIER A. DEVANE, JMW
United States District Judge

APPENDIX C TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

DISTRICT COURT'S ORDER GRANTING PERMANENT INJUNCTION.

This matter is now before this Court by virtue of the Mandate of the United States Court of Appeals for the Fifth Circuit and the Mandate of Mr. Justice Black of September 10, 1962 setting aside all stays granted by Judge Ben F. Cameron and putting into effect the mandates of the Court of Appeals for the Fifth Circuit enjoining the Trustees and officials of the University of Mississippi from taking any steps to prevent enforcement of the mandates of the Court of Appeals for the Fifth Circuit, and this Court having now considered the mandates of the Court of Appeals for the Fifth Circuit of July 17, 1962, July 27, 1962 and its final order of August 4, 1962, and this Court having considered the mandate of July 17, 1962 wherein the Court of Appeals reversed the judgment of the District Court with directions to this Court to issue an injunction as prayed for in the complaint and by its mandate of July 27, 1962 ordered that the judgment of that Court issued as and for the mandate on July 17, 1962, be recalled and amended by making explicit the meaning that was implicit as expressed in its opinion dated June 25, 1962 and ordering that this Court "forthwith grant all relief prayed for by the plaintiff and to issue forthwith a permanent injunction against each and all of the defendants-appellees, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, as well as any and all persons having knowledge of the decree, enjoining and compelling each and all of them to admit the plaintiff-appellant, James H. Meredith, to the University of Mississippi under his applications heretofore filed, which are declared by us to be

continuing applications. Such injunction shall in terms prevent and prohibit said defendants-appellees, or any of the classes of persons referred to from excluding the plaintiff-appellant from admission to continued attendance at the University of Mississippi."

And by its mandate of August 4, 1962 the Court of Appeals reaffirmed its orders of July 17, 1962 and July 27, 1962 in the following language: "All of our orders of July 17, July 27 and this date, therefore continue in full force and effect and require full and immediate obedience and compliance."

Now, therefore, it is here ordered, adjudged and decreed that the plaintiff, James Howard Meredith, be and he is hereby granted all the relief that is prayed for by him in his complaint and that the defendants, Charles Dickson Fair, President of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Louisville, Mississippi; Euclid Ray Jobe, Executive Secretary of the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, Jackson, Mississippi; Edgar Ray Izard, Hazlehurst, Mississippi; Leon Lowrey, Olive Branch, Mississippi; Ira Lamar Morgan, Oxford, Mississippi; Malcolm Mette Roberts, Hattiesburg, Mississippi; William Orlando Stone, Jackson, Mississippi; S. R. Evans, Greenwood, Mississippi; Verner Smith Holmes, McComb, Mississippi; James Napoleon Lipscomb, Macon, Mississippi; Tally D. Riddell, Quitman, Mississippi; Harry Gordon Carpenter, Rolling Fork, Mississippi; Robert Bruce Smith, II, Ripley, Mississippi and Thomas Jefferson Tubb, West Point, Mississippi, Members of the Board of Trustees of State Institutions of Higher Learning; James Davis Williams, Chancellor of the University of Mississippi, Oxford, Mississippi; Arthur Beverly Lewis, Dean of the College of Liberal Arts of the University of Mississippi, Oxford, Mississippi, and

Robert Byron Ellis, Registrar of the University of Mississippi, Oxford, Mississippi, and each of them, their agents, servants, employees, successors, attorneys and all persons in active concert and participation with them be and they hereby are permanently restrained and enjoined from:

(1) Refusing to admit plaintiff, James Howard Meredith immediately to the University of Mississippi and that they shall each of them be, and they are hereby required to admit him to the University of Mississippi upon the same terms and conditions as applicable to white students;

(2) From interfering in any manner with the right of plaintiff, James Howard Meredith to matriculate in, or attend the University of Mississippi;

(3) From taking any action or doing any act or being guilty of any conduct which will impair, frustrate or defeat his right to enter the University of Mississippi;

(4) Refusing to admit the plaintiff, James Howard Meredith to the University of Mississippi upon his applications heretofore filed, all of which are continuing applications.

It is further ordered that said defendants, or any of the classes of persons referred to, are prohibited and enjoined from excluding the said James Howard Meredith from admission to continued attendance at the University of Mississippi.

It is further ordered that the defendants, their servants, agents, employees, successors and assigns, and all persons acting in concert with them, are enjoined to admit the plaintiff, James Howard Meredith to the University of Mississippi upon his applications heretofore filed and they are enjoined from excluding the said James Howard Meredith from admission to continued attendance at the University of Mississippi or discriminating against him in any way whatsoever because of his race.

It is further ordered that a copy of this order and injunction be served by the United States Marshal on each of the defendants herein.

ORDERED, this the 13th day of September, 1962.

S. C. MIZE
United States District Judge

APPENDIX D TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

COURT OF APPEALS' TEMPORARY RESTRAINING ORDER.

This Court having entered its order in this action on July 28, 1962, and the District Court for the Southern District of Mississippi having entered a similar order on September 13, 1962, pursuant to the mandate of this Court, requiring the defendant officials of the University of Mississippi and the defendant members of the Board of Trustees of the Institutions of Higher Learning of the State of Mississippi to enroll James Howard Meredith as a student in the University of Mississippi, and

It appearing from the verified petition of the United States, *Amicus Curiae* herein, that the State of Mississippi, Ross R. Barnett, Governor of Mississippi, Joe T. Patterson, Attorney General of Mississippi, T. B. Birdsong, Commissioner of Public Safety of Mississippi, Paul G. Alexander, District Attorney of Hinds County, William R. Lamb, District Attorney of Lafayette County, J. Robert Gilfoy, Sheriff of Hinds County, J. W. Ford, Sheriff of Lafayette County, William D. Rayfield, Chief of Police of the City of Jackson, James D. Jones, Chief of Police of the City of Oxford, Walton Smith, Constable of the City of Oxford, the classes consisting of all district attorneys in Mississippi, the classes consisting of the sheriffs of all counties in Mississippi, the classes consisting of all chiefs of police in Mississippi, and the classes con-

sisting of all constables and town officials in Mississippi, threaten to implement and enforce, unless restrained by order of this Court, the provisions of a Resolution of Interposition adopted by the Mississippi Legislature, the provisions of Section 4065.3 of the Mississippi Code, and a Proclamation of Ross R. Barnett invoking the doctrine of interposition with respect to the enforcement of the orders of this Court in this case; that Paul G. Alexander has instituted two criminal prosecutions against James Howard Meredith on account of the efforts of James Howard Meredith to enroll in the University of Mississippi pursuant to the orders of this Court; that A. L. Meador, Sr., and the class of persons he represents, on September 19, 1962, instituted in the Chancery Court of the Second Judicial District of Jones County, Mississippi, a civil action against James Howard Meredith to prevent him from attending the University of Mississippi; that on September 20, 1962, James Howard Meredith, while seeking to enroll at the University of Mississippi in Oxford, Mississippi, pursuant to the orders of this Court, was served with a writ of injunction issued by the Chancery Court of Lafayette County, Mississippi, at the instance of Ross R. Barnett, enjoining James Howard Meredith from applying to or attending the University of Mississippi; that on September 20, 1962 the State of Mississippi enacted Senate Bill 1501, the effect of which is to punish James Howard Meredith should he seek enrollment in the University of Mississippi; that the effect of the conduct of the defendants herein named in implementing the policy of the State of Mississippi as proclaimed by Ross R. Barnett will necessarily be to prevent the carrying out of the orders of this Court and of the District Court for the Southern District of Mississippi; and that the acts and conduct of the defendants named in the petition will cause immediate and irreparable injury to the United States consisting of the impairment of the in-

tegrity of its judicial processes, the obstruction of the due administration of justice, and the deprivation of rights under the Constitution and laws of the United States, all before notice can be served and a hearing had,

IT IS ORDERED that the State of Mississippi, Ross R. Barnett, Joe T. Patterson, T. B. Birdsong, Paul G. Alexander, William R. Lamb, J. Robert Gilfoy, J. W. Ford, William D. Rayfield, James D. Jones, Walton Smith, the class consisting of all district attorneys in Mississippi, the class consisting of the sheriffs of all counties in Mississippi, the class consisting of all chiefs of police in Mississippi, and the class consisting of all constables and town marshals in Mississippi, their agents, employees, officers, successors, and all persons in active concert or participation with them, be temporarily restrained from:

1. Arresting, attempting to arrest, prosecuting or instituting any prosecution against James Howard Meredith under any statute, ordinance, rule or regulation whatever, on account of his attending, or seeking to attend, the University of Mississippi;

2. Instituting or proceeding further in any civil action against James Howard Meredith or any other persons on account of James Howard Meredith's enrolling or seeking to enroll, or attending the University of Mississippi;

3. Injuring, harassing, threatening or intimidating James Howard Meredith in any other way or by any other means on account of his attending or seeking to attend the University of Mississippi;

4. Interfering with or obstructing by any means or in any manner the performance of obligations or the enjoyment of rights under this Court's order of July 28, 1962 and the order of the United States District Court for the Southern District of Mississippi entered September 13, 1962, in this action, and

5. Interfering with or obstructing, by force, threat, arrest or otherwise, any officer or agent of the United States in the performance of duties in connection with the enforcement of, and the prevention of obstruction to, the orders entered by this Court and the District Court for the Southern District of Mississippi relating to the enrollment and attendance of James Howard Meredith at the University of Mississippi; or arresting, prosecuting or punishing such officer or agent on account of his performing or seeking to perform such duty.

IT IS FURTHER ORDERED that Paul G. Alexander and J. Robert Gilfoy be temporarily restrained from proceeding further, serving or enforcing any process or judgment, or arresting James Howard Meredith in connection with the criminal actions against him in the Justice of the Peace Court of Hinds County, Mississippi.

IT IS FURTHER ORDERED that A. L. Meador, Sr., be temporarily restrained from taking any further action or seeking to enforce any judgment entered in the case of *A. L. Meador, Sr.* v. *James Meredith, et al.*

IT IS FURTHER ORDERED that Ross R. Barnett be temporarily restrained from enforcing or seeking to enforce against James Howard Meredith, any process or judgment in the case of *State of Mississippi, Ex Rel Ross Barnett, Governor* vs. *James H. Meredith.*

ELBERT P. TUTTLE
Circuit Judge
RICHARD T. RIVES
Circuit Judge
JOHN MINOR WISDOM
Circuit Judge

Signed this 25th day of
September, 1962, at 8:30 A. M.

ARNOLD ET AL. *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 572. Argued March 26, 1964.—Decided April 6, 1964.

Petitioners, Negroes who had been indicted by an all-white grand jury in North Carolina, moved to quash the indictment on the ground that Negroes had been systematically excluded from grand juries in the county in which they were indicted. Although it was shown by uncontradicted evidence that Negroes comprise over 28% of persons on the tax records of the county, and over 30% of the persons on the poll tax list from which jurors are drawn, and that only one Negro served on a grand jury in 24 years, the motion was overruled and petitioners were convicted of murder. *Held:* The testimony made out a prima facie case of denial of the equal protection of the laws by systematic exclusion of Negroes from grand jury duty. *Eubanks* v. *Louisiana*, 356 U. S. 584, followed.

258 N. C. 563, 129 S. E. 2d 229, reversed.

J. Harvey Turner and *Fred W. Harrison* argued the cause and filed a brief for petitioners.

Ralph Moody, Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *T. W. Bruton*, Attorney General of North Carolina.

PER CURIAM.

The petitioners, Arnold and Dixon, were found guilty of murder by a jury and their convictions were affirmed, the Supreme Court of North Carolina concluding that they had not made out a case of systematic exclusion of Negroes from the grand jury which returned the indictment. 258 N. C. 563, 129 S. E. 2d 229. In support of their motion to quash the indictment because of consistent exclusion of Negroes from grand jury service, petitioners,

both Negroes, offered testimony of the county tax supervisor showing that the tax records of the county, on which Negro and white persons are listed separately and from which the names of jurors are derived, revealed 12,250 white persons and 4,819 Negroes in the county, with 5,583 white men and 2,499 Negro men listed for poll tax. In addition, the clerk of the trial court testified that while there have been as many as four or five Negroes upon the regular jury panel from which grand jurors have been chosen, in his 24 years as clerk he could remember only one Negro serving on a grand jury, another having been selected but excused. This evidence was uncontradicted, the State cross-examining the witnesses but offering no evidence.

The judgment below must be reversed. The "testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees." *Norris* v. *Alabama*, 294 U. S. 587, 591. The situation here is quite like that in *Eubanks* v. *Louisiana*, 356 U. S. 584, 586, where systematic exclusion of Negroes from grand jury duty was found. In that case:

> "Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory. . . . From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six or more Negroes were included in each list submitted to the local judges. Yet out of the 432 jurors selected only the single Negro was chosen."

See also *Hernandez* v. *Texas*, 347 U. S. 475.

PUBLISHERS' ASSOCIATION OF NEW YORK CITY *v.* NEW YORK MAILERS' UNION NUMBER SIX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 384. Argued March 23–24, 1964.—Decided April 6, 1964.

Judgment vacated insofar as it reversed stay provision, and case remanded to District Court with directions to dismiss as moot that portion of the complaint seeking a stay.

Reported below: 317 F. 2d 624.

Andrew L. Hughes argued the cause and filed a brief for petitioner.

Sidney Sugerman argued the cause for respondent. With him on the brief were *Gerhard P. Van Arkel* and *George Kaufmann.*

PER CURIAM.

Upon the respondent's suggestion of mootness the judgment of the United States Court of Appeals is vacated insofar as it reversed the stay provision of the judgment of the United States District Court for the Southern District of New York, and the case is remanded to the District Court with directions to dismiss as moot that portion of the complaint seeking such a stay.

HENRY ET AL. *v.* CITY OF ROCK HILL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 826. Decided April 6, 1964.

After this Court granted certiorari, vacated the judgment holding petitioners guilty of breach of the peace, and remanded the case to the Supreme Court of South Carolina "for further consideration in light of *Edwards* v. *South Carolina*, 372 U. S. 229," that court found *Edwards* and the later case of *Fields* v. *South Carolina*, 375 U. S. 44, not controlling and reaffirmed the convictions. *Held: Edwards* and *Fields*, which established that the peaceful expression of unpopular views at a place not lawfully proscribed by state law is protected by the Fourteenth Amendment from state criminal action, are controlling here.

Certiorari granted and judgment reversed.

Jack Greenberg, Constance Baker Motley, Matthew J. Perry, Lincoln C. Jenkins, Jr., Donald James Sampson and *Willie T. Smith, Jr.* for petitioners.

PER CURIAM.

When this case was last before us, we granted certiorari, vacated the judgment holding petitioners guilty of breach of the peace, and remanded the case to the Supreme Court of South Carolina "for further consideration in light of *Edwards* v. *South Carolina*, 372 U. S. 229." 375 U. S. 6. That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration. *Daegele* v. *Kansas*, 375 U. S. 1; *Pickelsimer* v. *Wainwright*, 375 U. S. 2; *Newsome* v. *North Carolina*, 375 U. S. 21; *Shockey* v. *Illinois*, 375 U. S. 22; *Ausbie* v. *California*, 375 U. S. 24; *Herrera* v. *Heinze*, 375 U. S. 26; *Barnes* v. *North Carolina*, 375 U. S. 28. The South Carolina Supreme Court examined *Edwards* and the later case of *Fields* v. *South*

Carolina, 375 U. S. 44, found them not controlling, and reaffirmed the convictions. In its opinion on the remand in the present case, the South Carolina Supreme Court expressed doubt concerning the meaning and significance of our remand order, and it went on to explain why, in its view, the *Edwards* and the *Fields* cases were distinguishable. For those reasons, it is appropriate to add these words of explanation.

The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits.* That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case.

We now think *Edwards* and *Fields* control the result here. As in those cases, the petitioners here, while at a place where the State's law did not forbid them to be, were engaged in the "peaceful expression of unpopular views." *Edwards* v. *South Carolina,* 372 U. S., at 237. They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation. They carried signs to that effect and they sang patriotic and religious songs. Although white onlookers assembled, no violence or threat of violence occurred and traffic was not disturbed. After 15 minutes of this, they were arrested for failure to disperse upon orders. Here, as in *Edwards* and *Fields,* petitioners "were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.'" *Ibid.* And here as there "they were convicted upon evidence which showed no more than that the opinions which they were

*The South Carolina Supreme Court intimated that the rule of *Edwards* was designed to guide us in determining our review of state action. But *Edwards* states a rule based upon the Constitution of the United States which, under the Supremacy Clause, is binding upon state courts as well as upon federal courts.

peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Ibid.*

Edwards established that the "Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Ibid.* As in *Edwards*, the South Carolina Supreme Court has here "defined a criminal offense so as to permit conviction of the petitioners if their speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.' [*Terminiello* v. *Chicago*, 337 U. S. 1, 5.]" *Id.*, at 238. Accordingly certiorari is granted and the judgment is reversed.

PAN-AMERICAN LIFE INSURANCE CO. *v.* RODRIGUEZ ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 67. Decided April 6, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 311 F. 2d 429.

William A. Gillen for petitioner.

John P. Corcoran, Jr. for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Banco Nacional de Cuba* v. *Sabbatino, ante,* p. 398.

J. B. ACTON, INC., *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 726. Decided April 6, 1964.

221 F. Supp. 174, affirmed.

James W. Wrape, Robert E. Joyner and *Harold G. Hernly* for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane and *Francis A. Silver* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

STANDARD CIGAR CO. *v.* TABACALERA SEVERIANO JORGE, S. A.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 78. Decided April 6, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 311 F. 2d 439.

William A. Gillen for petitioner.

Thomas H. Anderson and *Herbert L. Nadeau* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Banco Nacional de Cuba* v. *Sabbatino, ante,* p. 398.

AETNA INSURANCE CO. *v.* MENENDEZ.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 68. Decided April 6, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 311 F. 2d 437.

William A. Gillen for petitioner.

John P. Corcoran, Jr. for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Banco Nacional de Cuba* v. *Sabbatino, ante,* p. 398.

TELEPHONE NEWS SYSTEM, INC., *v.* ILLINOIS BELL TELEPHONE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 772. Decided April 6, 1964.

220 F. Supp. 621, affirmed.

Thomas D. Nash, Jr. for appellant.

Solicitor General Cox for the United States, and *Walter J. Cummings, Jr.* for Illinois Bell Telephone Co., appellees.

PER CURIAM.

The judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

YRIBARNE *v.* COUNTY OF SAN BERNARDINO ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

No. 811. Decided April 6, 1964.

Appeal dismissed for want of a substantial federal question. Reported below: 218 Cal. App. 2d 369, 32 Cal. Rptr. 847.

Herman F. Selvin for appellant.

John N. Cramer for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

UNITED FUEL GAS CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 527. Decided April 6, 1964.

Appeal dismissed for want of a substantial federal question.

Albert R. Connelly, Edward S. Pinney, Victor M. Earle III, C. E. Goodwin, John F. Hunt, Jr., Charles C. Wise, Jr. and *William C. Hart* for appellant.

Robert L. Stewart for appellee.

Solicitor General Cox, Ralph S. Spritzer, Frank I. Goodman, Richard A. Solomon and *Howard E. Wahrenbrock* for the United States et al., as *amici curiae*.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 784 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM FEBRUARY 12 THROUGH APRIL 6, 1964.

FEBRUARY 12, 1964.

Dismissal Under Rule 60.

No. 794. CURTIS PUBLISHING CO. *v.* GROOMS, U. S. DISTRICT JUDGE, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Jesse Climenko, Philip H. Strubing* and *T. Eric Embry* for petitioner. *Winston B. McCall, William S. Pritchard* and *Francis H. Hare* for respondents.

FEBRUARY 17, 1964.

Miscellaneous Orders.

No. 463, October Term, 1962. FITZGERALD, PUBLIC ADMINISTRATOR, *v.* UNITED STATES LINES CO., 374 U. S. 16, rehearing denied, 375 U. S. 870. The motion of petitioner to clarify opinion and to amend or modify the judgment is denied. MR. JUSTICE BLACK is of the opinion that the motion should be granted. *Theodore H. Friedman* on the motion.

No. —. IN RE HARDIE. The motion to amend the attorneys' roll to show the change of name of Jessie Hendrick Hardie to Jessie Hendrick Bartlett is granted.

No. 141. CARBO *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The motion for leave to file a supplement to the petition for certiorari is granted. *William B. Beirne, A. L. Wirin* and *Fred Okrand* on the motion.

No. 216. IN RE ESTATE OF WILLIAMS. (Certiorari to the Supreme Court of Pennsylvania denied, 375 U. S. 821, rehearing denied, 375 U. S. 936.) The motion for docketing and submission of petitioner's motion to remand for consideration on the merits is denied. *Paul Ginsburg* on the motion.

No. 381. MEYERS, SECRETARY OF STATE OF WASHINGTON, *v.* THIGPEN ET AL. On appeal from the United States District Court for the Western District of Washington. The application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, is granted and the judgment of the United States District Court for the Western District of Washington of May 27, 1963, is stayed pending the issuance of the judgment of this Court. *John J. O'Connell,* Attorney General of Washington, *Philip H. Austin,* Assistant Attorney General, and *Lyle L. Iversen,* Special Assistant Attorney General, for appellant. *Vincent H. D. Abbey* for Thigpen, and *Stimson Bullitt* for the League of Women Voters of Washington, Inc., appellees.

No. 669. HATTIESBURG BUILDING & TRADES COUNCIL ET AL. *v.* BROOME, DOING BUSINESS AS BROOME CONSTRUCTION & MAINTENANCE CO., ET AL. On petition for writ of certiorari to the Supreme Court of Mississippi. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 749. KELLER *v.* WISCONSIN EX REL. STATE BAR OF WISCONSIN. On petition for writ of certiorari to the Supreme Court of Wisconsin. The Solicitor General is invited to file a brief expressing the views of the United States on the extent of the authority granted by a license to practice issued by the Interstate Commerce Commission as applied to the activities involved in this case.

No. 818, Misc. FRANCO *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 830, Misc. KING *v.* RHAY, PENITENTIARY SUPERINTENDENT;

No. 875, Misc. TANSIMORE *v.* ANDERSON;

No. 905, Misc. WATKINS *v.* MADIGAN, WARDEN;

No. 917, Misc. WINBERRY *v.* FLORIDA;

No. 922, Misc. REICKAUER *v.* PEYTON, PENITENTIARY SUPERINTENDENT;

No. 941, Misc. KARL *v.* RICHARDSON, WARDEN;

No. 949, Misc. AREND *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT;

No. 950, Misc. MACFADDEN *v.* ALAMEDA CITY POLICE COURT ET AL.;

No. 960, Misc. BULLINER *v.* EYMAN, WARDEN;

No. 978, Misc. PARTEE *v.* OHIO;

No. 984, Misc. COOK *v.* TAYLOR, WARDEN; and

No. 987, Misc. O'NEILL *v.* TAHASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 891, Misc. VASQUEZ *v.* ARIZONA ET AL.;

No. 904, Misc. DUMOND *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 935, Misc. BURNS *v.* KANSAS;

No. 956, Misc. BRANNAN *v.* HOLMAN, WARDEN;

No. 964, Misc. TRIPLETT *v.* ARIZONA ET AL.;

No. 986, Misc. TOMKALSKI *v.* OHIO ET AL.; and

No. 998, Misc. FORSYTHE *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

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No. 924, Misc. IN RE LIPSCOMB. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 910, Misc. SIMMONS *v.* FOLEY, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

Certiorari Granted. (*See also No. 663, ante, p. 189; No. 412, Misc., ante, p. 188; and No. 453, Misc., ante, p. 191.*)

No. 539. HENRY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari granted. *Robert L. Carter, Jawn A. Sandifer* and *Jack H. Young* for petitioner. *Joe T. Patterson*, Attorney General of Mississippi, and *G. Garland Lyell, Jr.*, Assistant Attorney General, for respondent. Reported below: — Miss. —, 154 So. 2d 289.

No. 590. RYAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *William R. Bagby* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 320 F. 2d 500.

No. 452, Misc. DEW *v.* HALABY, ADMINISTRATOR, FEDERAL AVIATION AGENCY, ET AL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 115 U. S. App. D. C. 171, 317 F. 2d 582.

No. 696. BECK *v.* OHIO. Supreme Court of Ohio. Certiorari granted. *Jay B. White* for petitioner. *Richard F. Matia* for respondent. *Bernard A. Berkman* and *Jack G. Day* for Ohio Civil Liberties Union, as *amicus curiae*, in support of the petition. Reported below: 175 Ohio St. 73, 191 N. E. 2d 825.

No. 707. BRULOTTE ET AL. *v.* THYS COMPANY. The petition for writ of certiorari to the Supreme Court of Washington is granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether it is a misuse to include in a license agreement a provision which perpetuates the monopoly of a licensed patent by a requirement that royalties be paid for the use of the invention after the patent has expired and the invention had been dedicated to the public.

"2. Whether it is a misuse or an antitrust violation to include in a license agreement a provision which extends the monopoly of a patent to unpatented subject matter by a provision which requires the payment of post-expiration royalties."

Edward S. Irons for petitioners. *George W. Wilkins* for respondent. Reported below: 62 Wash. 2d 284, 382 P. 2d 271.

Certiorari Denied. (*See also No. 681, ante, p. 187; No. 745, Misc., ante, p. 187; No. 908, Misc., ante, p. 188; and Misc. Nos. 891, 904, 935, 956, 964, 986 and 998, supra.*)

No. 612. ADDISON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James L. Guilmartin, Fuller Warren* and *Stanley Jay Bartel* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 317 F. 2d 808.

No. 420. BANCO DO BRASIL, S. A., *v.* A. C. ISRAEL COMMODITY CO., INC. Court of Appeals of New York. Certiorari denied. *Frank E. Nattier, Jr., Ansel F. Luxford, Richard L. Newman* and *James H. Mann* for petitioner. *Jerome J. Londin, Ernest A. Gross, Hugo Kohlmann* and *John P. Campbell* for respondent. *Solicitor General Cox* for the United States in opposition. Reported below: 12 N. Y. 2d 371, 190 N. E. 2d 235.

No. 614. ARMADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *O. B. Cline, Jr.* and *Henry Carr* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 319 F. 2d 793.

No. 624. TEMESCAL WATER CO. ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Supreme Court of California. Certiorari denied. *Donald D. Stark* for petitioners. *J. Thomason Phelps* for respondent.

No. 630. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Vincent A. Ross* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 323 F. 2d 91.

No. 631. BUILDERS CORPORATION OF AMERICA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Benjamin H. Dorsey* and *Alvin Landis* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Kathryn H. Baldwin* for the United States. Reported below: 320 F. 2d 425.

No. 649. CASTIGLIA *v.* BONSAL, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Edward S. Friedland* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent.

No. 634. AMERICAN STEVEDORES, INC., *v.* SHENKER ET AL. C. A. 2d Cir. Certiorari denied. *George J. Conway* and *Michael J. Kenny* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *David L. Rose* for the United States; and *Jacob D. Fuchsberg* for Shenker, respondents. Reported below: 322 F. 2d 622.

No. 642. BURNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hilton R. Carr, Jr., Herbert A. Warren, Jr.* and *O. B. Cline, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 323 F. 2d 269.

No. 653. LARUE ET UX. *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Ginsburg, Leonard N. Bebchick* and *Alan L. Reinstein* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark* for the Secretary of the Interior; and *Charles Pickett* and *Warren E. Baker* for North American Aviation, Inc., respondents. Reported below: 116 U. S. App. D. C. 396, 324 F. 2d 428.

No. 664. WESTERN FRUIT GROWERS SALES CO. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *James M. Dale* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Elliott Moyer* and *James McI. Henderson* for respondent. Reported below: 322 F. 2d 67.

No. 671. ELBERT MOORE, INC., *v.* GREEN, COMPTROLLER OF FLORIDA, ET AL. District Court of Appeal of Florida, First Appellate District. Certiorari denied. *John R. Lawson, Jr.* for petitioner. Reported below: 156 So. 2d 397.

No. 670. GIBSON ET AL. *v.* HARRIS ET AL. C. A. 5th Cir. Certiorari denied. *Geo. Stephen Leonard, Reid B. Barnes, Charles J. Bloch* and *Richard L. Hirshberg* for petitioners. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Derrick A. Bell, Jr., Oscar W. Adams, Jr.* and *Donald L. Hollowell* for respondents. Reported below: 318 F. 2d 425; 322 F. 2d 780; 323 F. 2d 333.

No. 674. AUTOMOBILE TRANSPORTERS WELFARE FUND ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *David Previant* and *Charles R. Katz* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Philip Kahaner,* Assistant Attorney General, for respondent.

No. 676. ROBINSON *v.* BROWN, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *W. M. Shaw* for petitioner. *Avon N. Williams, Jr.* and *Jack Greenberg* for respondent. Reported below: 320 F. 2d 503.

No. 678. NAFI CORPORATION *v.* AMERICAN ARBITRATION ASSOCIATION ET AL. Court of Appeals of Ohio, Hancock County. Certiorari denied. *Richard A. Betts* for petitioner. *Ralph Rudd* for respondent Textile Workers Union of America, Local Union No. 981.

No. 693. HEWARD *v.* CROMWELL. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 216 Cal. App. 2d 613, 31 Cal. Rptr. 249.

No. 695. SPILOTRO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius Lucius Echeles* for petitioner. Reported below: 28 Ill. 2d 322, 192 N. E. 2d 359.

No. 679. D'ANTONIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Alan Miles Ruben* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 324 F. 2d 667.

No. 685. SKYLINE HOMES, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Larry S. Davidow* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 323 F. 2d 642.

No. 686. BROWN ET UX. *v.* SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY ET AL. Supreme Court of Washington. Certiorari denied. Petitioners *pro se*. *F. A. LeSourd* for respondents. Reported below: 62 Wash. 2d 492, 383 P. 2d 295.

No. 687. ROEHNER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Lyman M. Tondel, Jr.* for respondent.

No. 689. SHEW ET VIR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *J. Allie Hayes* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 324 F. 2d 733.

No. 692. SOMMERVILLE, DOING BUSINESS AS NEW WILMINGTON LIVESTOCK AUCTION, *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Loyal H. Gregg* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 324 F. 2d 712.

No. 694. HUNT OIL CO. ET AL. *v.* MARATHON OIL CO., FORMERLY OHIO OIL CO., ET AL. C. A. 5th Cir. Certiorari denied. *Joseph C. LeSage, Jr.* and *James D. Heldt* for petitioners. *Arthur O'Quin, Robert Roberts, Jr., C. Ford Currier, Clayton L. Orn* and *Calvin A. Brown* for respondent Marathon Oil Co. Reported below: 321 F. 2d 702.

No. 697. REYNOLDS METALS CO. ET AL. *v.* LAMPERT ET UX. C. A. 9th Cir. Certiorari denied. *Gustav B. Margraf* for petitioners. Reported below: 316 F. 2d 272; 324 F. 2d 465.

No. 699. KASSAB *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* and *Patrick J. Hillings* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 322 F. 2d 824.

No. 702. GALLOWAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. Reported below: 28 Ill. 2d 355, 192 N. E. 2d 370.

No. 704. HANSEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Morris Gordon Meyers* for petitioner. Reported below: 28 Ill. 2d 322, 192 N. E. 2d 359.

No. 708. CITY OF JACKSON ET AL. *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. *Thomas H. Watkins* and *John M. Kuykendall, Jr.* for petitioners. *Jack Greenberg, Constance Baker Motley, Derrick A. Bell, Jr.* and *R. Jess Brown* for respondents. Reported below: 323 F. 2d 201.

No. 705. WHALEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 324 F. 2d 356.

No. 712. SAMPSON *v.* CHURCH, DISTRICT DIRECTOR, INTERNAL REVENUE SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph Kovner* and *Crombie J. D. Garrett* for respondents.

No. 713. NABORS, DOING BUSINESS AS W. C. NABORS CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Louis H. Beard* for petitioner. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 323 F. 2d 686.

No. 714. DONOHUE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Sydney M. Eisenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Burton Berkley* for respondent. Reported below: 323 F. 2d 651.

No. 715. JACOBS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Edward J. Davis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 324 F. 2d 680.

No. 723. INTER-CITY TRANSPORTATION CO., INC., *v.* BARNES, COMMISSIONER OF TRAFFIC OF THE CITY OF NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Herman Horowitz* and *Murray Sendler* for petitioner. *Leo A. Larkin* and *Seymour B. Quel* for respondent.

No. 716. LEWIS *v.* PENNSYLVANIA RAILROAD CO. Court of Appeals of Ohio, Franklin County. Certiorari denied. *C. Richard Grieser* for petitioner. *Robert L. Barton* and *John Eckler* for respondent.

No. 729. WILSON ET AL. *v.* WASHINGTON CONGREGATIONAL CHURCH. Supreme Court of Ohio. Certiorari denied. *R. B. Swartzbaugh* for petitioners. *Fred A. Smith* for respondent.

No. 730. WISCONSIN & MICHIGAN STEAMSHIP CO. *v.* CORPORATION AND SECURITIES COMMISSION. Supreme Court of Michigan. Certiorari denied. *Sparkman D. Foster* for petitioner. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *T. Carl Holbrook* and *William D. Dexter*, Assistant Attorneys General, for respondent. Reported below: 371 Mich. 61, 123 N. W. 2d 258.

No. 734. MOORE *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Carl Rachlin, Robert Collins, Nils Douglas* and *Floyd McKissick* for petitioner. *Jack P. F. Gremillion*, Attorney General of Louisiana, for respondent.

No. 738. TRAVITZKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 322 F. 2d 1023.

No. 762. DRANOW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* and *Jacques M. Schiffer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 325 F. 2d 481.

No. 750. LODGE No. 42, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS ET AL. C. A. 6th Cir. Certiorari denied. *James C. Havron* for petitioners. *Cecil D. Branstetter* for respondents. Reported below: 324 F. 2d 201.

No. 682. AMERICAN PIPE & CONSTRUCTION CO. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Frank D. MacDowell, John J. Courtney* and *J. O. von Kalinowski* for petitioners. *Richards D. Barger* for Perovich et al., respondents.

No. 554. POPEIL BROTHERS, INC., *v.* ZYSSET ET AL. Motion of petitioner for leave to file new and additional conflicting authority granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George B. Christensen* and *Dugald S. McDougall* for petitioner. *Albin C. Ahlberg* and *Warren C. Horton* for respondents. Reported below: 318 F. 2d 701.

No. 609. RUBY, PRESIDENT OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Samuel J. Cohen* for petitioners. *Arthur M. Wisehart* for American Airlines, Inc., and *Martin C. Seham* for O'Connell et al., respondents. *Solicitor General Cox* for the National Mediation Board, as *amicus curiae,* in opposition. Reported below: 323 F. 2d 248.

No. 756. BADGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 322 F. 2d 902.

No. 657. OSTERMAN, JUDGE, *v.* COURT ON THE JUDICIARY OF NEW YORK. Court on the Judiciary of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Harris B. Steinberg* for petitioner. *Bruce Bromley* for respondent.

No. 698. WORZ, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Motion for leave to use the record in No. 349, October Term, 1958, granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Lucius J. Cushman* and *Lee G. Lovett* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ernest O. Eisenberg* for the Federal Communications Commission; and *Marcus Cohn* for Mid-Florida Television Corp., respondents. Reported below: 116 U. S. App. D. C. 316, 323 F. 2d 618.

No. 18, Misc. SYKES *v.* TAYLOR, WARDEN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 145, Misc. GILLIAM *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

No. 700. SANGAMON VALLEY TELEVISION CORP. ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *D. M. Patrick* for Sangamon Valley Television Corp.; and *William G. Clark*, Attorney General of Illinois, and *M. Brooks Byus*, Assistant Attorney General, for the State of Illinois, petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the United States et al.; *Monroe Oppenheimer* and *Isadore G. Alk* for Signal Hill Telecasting Corp.; and *James A. McKenna, Jr.* and *Vernon L. Wilkinson* for American Broadcasting-Paramount Theatres, Inc., et al., respondents. Reported below: 116 U. S. App. D. C. 347, 324 F. 2d 379.

No. 721. FAY, WARDEN, *v.* WILLIAMS. Motion to dispense with printing the respondent's brief granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Edward S. Silver* and *William I. Siegel* for petitioner. *Pasco M. Bowman II* for respondent. Reported below: 323 F. 2d 65.

No. 336, Misc. SMITH *v.* BOMAR, WARDEN. Supreme Court of Tennessee. Certiorari denied. Petitioner *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Henry C. Foutch*, Assistant Attorney General, for respondent. Reported below: 212 Tenn. 149, 368 S. W. 2d 748.

No. 378, Misc. BEREND *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, former Attorney General of Florida, *James W. Kynes*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 400, Misc. ROGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 313 F. 2d 425.

No. 424, Misc. COFFEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 12 N. Y. 2d 443, 191 N. E. 2d 263.

No. 468, Misc. ZUIDEVELD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 316 F. 2d 873.

No. 513, Misc. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Fred Okrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 320 F. 2d 843.

No. 533, Misc. KELLY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Superior Court of Washington, Walla Walla County. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Stephen C. Way*, Assistant Attorney General, for respondent.

No. 561, Misc. ESTEP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 316 F. 2d 767.

No. 573, Misc. POSTOM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 116 U. S. App. D. C. 219, 322 F. 2d 432.

No. 585, Misc. HOLT *v.* CITY OF RICHMOND. Supreme Court of Appeals of Virginia. Certiorari denied. *Lawrence Speiser* and *Michael Gottesman* for petitioner. *J. E. Drinard* for respondent. Reported below: 204 Va. 364, 131 S. E. 2d 394.

No. 603, Misc. MATYSEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 321 F. 2d 246.

No. 618, Misc. HOWARD *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *H. Douglas Stine* and *Ralph DeVita* for respondent.

No. 624, Misc. STANDLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 318 F. 2d 700.

No. 625, Misc. ARMSTRONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 320 F. 2d 330.

No. 768, Misc. MASON *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 652, Misc. JOHNSON *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *Joseph K. Fornance* for petitioner. Respondent *pro se*. Reported below: 411 Pa. 497, 192 A. 2d 381.

No. 676, Misc. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 321 F. 2d 85.

No. 679, Misc. KUHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Graydon S. Staring* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 322 F. 2d 582.

No. 690, Misc. GORI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 701, Misc. PIERCE ET AL. *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Edward W. Jacko, Jr.* for petitioners. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Ronald J. Offenkrantz* and *Lester Esterman*, Assistant Attorneys General, for respondent. Reported below: 319 F. 2d 844.

No. 738, Misc. KEARNEY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 709, Misc. MORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 317 F. 2d 818.

No. 719, Misc. OVERSTREET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *M. Gabriel Nahas, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 321 F. 2d 459.

No. 747, Misc. MORRIS *v.* HOERSTER ET AL. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. Reported below: 368 S. W. 2d 639, 640.

No. 755, Misc. BUND *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Harry Rodwin* and *Richard Rodwin* for petitioner. *Frank S. Hogan* for respondent.

No. 761, Misc. COMER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 770, Misc. WOODS *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. *James M. Nabrit III* for petitioner. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 191 Kan. 433, 381 P. 2d 533.

No. 777, Misc. HOMCHAK *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 323 F. 2d 449.

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No. 779, Misc. MAVITY *v.* ASSOCIATES DISCOUNT CORP. C. A. 5th Cir. Certiorari denied. *Harold H. Gearinger* and *Charles C. Moore* for petitioner. *Robert Edward Surles* for respondent. Reported below: 320 F. 2d 133.

No. 781, Misc. GOLDSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 323 F. 2d 753.

No. 782, Misc. ASHE *v.* SHOVLIN ET AL. C. A. 3d Cir. Certiorari denied.

No. 783, Misc. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States.

No. 784, Misc. STILTNER *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 322 F. 2d 314.

No. 786, Misc. WARREN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles V. Shannon* and *Richard F. Generelly* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 116 U. S. App. D. C. 312, 323 F. 2d 614.

No. 795, Misc. ARAGON *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: 153 Colo. ——, 384 P. 2d 454.

No. 787, Misc. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 324 F. 2d 371.

No. 790, Misc. WALKER *v.* KONITZER ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied. Reported below: 217 Cal. App. 2d 654, 31 Cal. Rptr. 906.

No. 796, Misc. MARTIN, DOING BUSINESS AS JACK MARTIN NEWER CARS, *v.* MOSSLER ACCEPTANCE CO., DOING BUSINESS AS ALLEN-PARKER CO. C. A. 5th Cir. Certiorari denied. *J. Russell Hornsby* for petitioner. *Frank M. Marks* for respondent. Reported below: 322 F. 2d 183.

No. 798, Misc. DESTEFANO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 801, Misc. SMITH *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 802, Misc. SORRELLS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 812, Misc. TWEEDY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 808, Misc. WHITE *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 827, Misc. DUKE *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 371 S. W. 2d 639.

No. 809, Misc. RAMSEY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 803, Misc. HINGUANZO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Josiah Lyman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 805, Misc. BEARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 320 F. 2d 99.

No. 807, Misc. CALITRI *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 813, Misc. PITMON *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 816, Misc. KILGORE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 323 F. 2d 369.

No. 819, Misc. WASHA *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 820, Misc. JOHNSON *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Isaac Mellman* and *Gerald N. Mellman* for petitioner. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John E. Bush*, Assistant Attorney General, for respondent. Reported below: 152 Colo. —, 384 P. 2d 454.

No. 822, Misc. DOYON *v.* ROBBINS, WARDEN. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Frank E. Hancock*, Attorney General of Maine, and *John W. Benoit*, Assistant Attorney General, for respondent. Reported below: 322 F. 2d 486.

No. 824, Misc. DOBBINS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 274 Ala. 524, 149 So. 2d 814.

No. 826, Misc. LUGO *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 828, Misc. MAGEE *v.* PEYTON. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 829, Misc. REED *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 831, Misc. ARAGON *v.* EYMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 832, Misc. NICHELSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 834, Misc. SUTOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Miller*, *Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 324 F. 2d 620.

No. 838, Misc. JONES *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 835, Misc. BURD *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 837, Misc. MCNAIR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 839, Misc. HITCHCOCK *v.* EYMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 847, Misc. STELLO ET AL. *v.* STRAND ET AL. Supreme Court of California. Certiorari denied.

No. 849, Misc. MULLINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 412, 192 N. E. 2d 840.

No. 850, Misc. CUNNINGHAM *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 851, Misc. OPPENHEIMER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 852, Misc. CROOM *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 853, Misc. VAN PELT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 854, Misc. DONNELL *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 323 F. 2d 850.

No. 855, Misc. LEIBOWITZ *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Joseph Aronstein* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Anthony J. Lokot*, Assistant Attorney General, for respondent.

No. 859, Misc. BAXTER *v.* AUSTIN, JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 860, Misc. WYATT *v.* SOUTH CAROLINA ET AL. Supreme Court of South Carolina. Certiorari denied. Reported below: 243 S. C. 197, 133 S. E. 2d 120.

No. 861, Misc. HAYES *v.* MACDOUGALL, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied.

No. 864, Misc. GASKEY *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 255 Iowa 967, 124 N. W. 2d 723.

No. 866, Misc. BITTLES *v.* BITTLES. Supreme Judicial Court of Maine. Certiorari denied.

No. 867, Misc. WHITE *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 322 F. 2d 214.

No. 868, Misc. MAGEE ET AL. *v.* CALIFORNIA; and
No. 872, Misc. CASTILLO *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. *Edward T. Mancuso* for petitioners in No. 868, Misc. *Salvatore C. J. Fusco* for petitioner in No. 872, Misc. Reported below: 217 Cal. App. 2d 443, 31 Cal. Rptr. 658.

No. 870, Misc. KNIGHT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 871, Misc. CORTEZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 873, Misc. BROOKS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 877, Misc. BUSH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Charles Alan Wright* and *Billy J. Moore* for petitioner. Reported below: 372 S. W. 2d 683.

No. 879, Misc. REAM *v.* SUPERIOR COURT OF WALLA WALLA COUNTY, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 880, Misc. IN RE SCOTT. Supreme Court of California. Certiorari denied.

No. 881, Misc. SEYMORE *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 884, Misc. WHITE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 885, Misc. DENNIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 28 Ill. 2d 525, 193 N. E. 2d 14.

No. 886, Misc. MARTINEZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 897, Misc. COKELEY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 902, Misc. DANDY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 894, Misc. BOWEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 29 Ill. 2d 349, 194 N. E. 2d 316.

No. 888, Misc. REAM *v.* WASHINGTON BOARD OF PRISON TERMS AND PAROLES. Supreme Court of Washington. Certiorari denied.

No. 906, Misc. CASPER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 909, Misc. WILKES *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 916, Misc. SLIVA *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 967, Misc. ALSTON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 919, Misc. DEVAUGHN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 232 Md. 447, 194 A. 2d 109.

No. 920, Misc. BRILL *v.* MULLER BROTHERS, INC. Court of Appeals of New York. Certiorari denied. Reported below: 13 N. Y. 2d 776, 192 N. E. 2d 34.

No. 926, Misc. ALVARADO *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 220 Cal. App. 2d 190, 33 Cal. Rptr. 577.

No. 925, Misc. DARNOLD ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *DeWitt Foster Blase* for petitioners.

No. 918, Misc. KING *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 923, Misc. GOMEZ *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 290, Misc. SCULL *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 793, Misc. SMITH *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stephen F. Lichtenstein* for petitioner. *Guy W. Calissi* for respondents. Reported below: 322 F. 2d 810.

No. 731, Misc. BAREFIELD ET AL. *v.* BYRD, REGIONAL MANAGER, VETERANS ADMINISTRATION CENTER, ET AL. Motion for leave to file a supplement to the petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Oliver W. Cosey* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 320 F. 2d 455.

Rehearing Denied.

No. 533, October Term, 1962. DYER *v.* MURRAY, TRUSTEE, ET AL., 371 U. S. 949, 373 U. S. 905, 375 U. S. 892. Motion for leave to file a third petition for rehearing denied.

No. 348. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL. *v.* DAVIS ET AL., 375 U. S. 894; and

No. 265, Misc. SULLIVAN *v.* UNITED STATES, 375 U. S. 910. Motions for leave to file petitions for rehearing denied.

No. 219. TYRELL ET AL. *v.* BERDECIA, 375 U. S. 881;

No. 479. BECK *v.* UNITED STATES, 375 U. S. 972;

No. 506. FRANK ADAMS & CO. ET AL. *v.* UNITED STATES ET AL., 375 U. S. 215;

No. 531. COOPER *v.* UNITED STATES, 375 U. S. 964;

No. 538. G. L. CHRISTIAN & ASSOCIATES *v.* UNITED STATES, 375 U. S. 954;

No. 598. PEORIA & PEKIN UNION RAILWAY CO. ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO., 375 U. S. 969;

No. 616. CHICAGO METALLIC MANUFACTURING CO. *v.* EKCO PRODUCTS CO., INC., 375 U. S. 970;

No. 528, Misc. OPPENHEIMER *v.* CALIFORNIA, 375 U. S. 975;

No. 653, Misc. SMITH *v.* UNITED STATES, 375 U. S. 988;

No. 693, Misc. PEPPENTENZZA *v.* RHAY, PENITENTIARY SUPERINTENDENT, 375 U. S. 959; and

No. 704, Misc. MAHURIN *v.* MISSOURI, 375 U. S. 977. Petitions for rehearing denied.

No. 342. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL., 375 U. S. 880, 949. Motion for leave to file a second petition for rehearing denied.

FEBRUARY 24, 1964.

Miscellaneous Orders.

No. 936, Misc. HALL *v.* EL PASO COUNTY ATTORNEY;

No. 937, Misc. GLESMANN ET AL. *v.* SIGLER, WARDEN;

No. 938, Misc. HANSEN *v.* COFFEY, JUDGE;

No. 939, Misc. CRUZ *v.* BETO, CORRECTIONS DIRECTOR; and

No. 959, Misc. ALLEN *v.* JOHNSON, PRESIDING JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 234. GINSBURG *v.* STERN ET AL. (Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied, 375 U. S. 823, rehearing denied, 375 U. S. 936.) The motion for docketing and submission of petitioner's motion to remand for consideration on the merits is denied. *Paul Ginsburg* on the motion.

No. 714, Misc. TRINTA ET AL. *v.* SUPERIOR COURT OF PUERTO RICO ET AL. On petition for writ of certiorari to the Supreme Court of Puerto Rico. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 1009, Misc. PENRICE *v.* CALIFORNIA; and

No. 1010, Misc. STRATTON *v.* MAXWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See No. 680, ante, p. 203, and No. 422, Misc., ante, p. 202.*)

Certiorari Denied. (*See also No. 691, ante, p. 202.*)

No. 733. COSTELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George Olshausen* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 324 F. 2d 260.

No. 740. THORNBERRY *v.* BUCHANAN COUNTY COAL CORP. C. A. 6th Cir. Certiorari denied. *Dan Jack Combs* for petitioner. *Joe Hobson* for respondent. Reported below: 323 F. 2d 517.

No. 748. PINKSTON *v.* CARTER ET UX. C. A. 4th Cir. Certiorari denied. *Jack Pinkston*, petitioner, *pro se*. Reported below: 322 F. 2d 476.

No. 736. Evanston-North Shore Board of Realtors *v.* United States. Court of Claims. Certiorari denied. *Theodore A. Groenke* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: — Ct. Cl. —, 320 F. 2d 375.

No. 764. Sorce et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Max L. Feinberg* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 325 F. 2d 84.

No. 774. Testa *v.* United States. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Jacob Kossman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 326 F. 2d 730.

No. 720. In re Eastern Air Lines, Inc.; and

No. 766. In re National Airlines, Inc. C. A. 1st Cir. Certiorari denied. Mr. Justice Black took no part in the consideration or decision of these petitions. *E. Smythe Gambrell, Harold L. Russell, Robert Proctor* and *Richard Wait* for Eastern Air Lines, Inc. *John W. Cross* for National Airlines, Inc. *Acting Solicitor General Spritzer* for the Civil Aeronautics Board. *Henry E. Foley* and *John H. Pickering* for Northeast Airlines, Inc., in opposition.

No. 219, Misc. Wilcox *v.* Colorado. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *John E. Bush*, Assistant Attorney General, for respondent. Reported below: 152 Colo. 173, 380 P. 2d 912.

No. 744. MISHNE ET AL. *v.* OHIO. Court of Appeals of Ohio, Geauga County. Certiorari denied. *Adrian B. Fink, Jr.* for petitioners. *William Saxbe,* Attorney General of Ohio, for respondent.

No. 747. LUCCHESI ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Nelson R. Kandel* for petitioners. Reported below: 232 Md. 465, 194 A. 2d 266.

No. 769. RODGERS *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Donald M. Dunn* and *Clifton P. Williamson* for respondent. Reported below: 323 F. 2d 996.

No. 780. SLATER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ellis F. Morris* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 324 F. 2d 494.

No. 357, Misc. SITTLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 316 F. 2d 312.

No. 570, Misc. CHILDS ET AL. *v.* PEGELOW, REFORMATORY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents. Reported below: 321 F. 2d 487.

No. 722, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 668, Misc. ABREU *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 669, Misc. ZUPICICH *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Robert J. Carluccio* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, L. Paul Winings* and *Charles Gordon* for respondent. Reported below: 319 F. 2d 773.

No. 901, Misc. WOLFE *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 324 F. 2d 959.

No. 751, Misc. HOLMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 323 F. 2d 430.

No. 899, Misc. DAWSON *v.* BOMAR, WARDEN. C. A. 6th Cir. Certiorari denied. *Fred P. Graham* for petitioner. Reported below: 322 F. 2d 445.

No. 921, Misc. CATER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *W. Bradley Ward* for petitioner. Reported below: 412 Pa. 67, 194 A. 2d 185.

No. 840, Misc. LEWIS *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *Allan R. Rosenberg* for petitioner. *Edward W. Brooke*, Attorney General of Massachusetts, and *James W. Bailey*, Assistant Attorney General, for respondent. Reported below: 346 Mass. 373, 191 N. E. 2d 753.

No. 933, Misc. EVANS *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 372 S. W. 2d 798.

No. 858, Misc. HALFEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 321 F. 2d 556.

No. 800, Misc. COSTNER *v.* UNITED STATES BOARD OF PAROLE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 927, Misc. SLOAN *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 931, Misc. MCCRAE *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *I. A. Kanarek* for petitioner. Reported below: 218 Cal. App. 2d 725, 32 Cal. Rptr. 500.

No. 940, Misc. EDWARDSEN *v.* MARYLAND. Circuit Court of Baltimore County, Maryland. Certiorari denied.

No. 948, Misc. DORN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 958, Misc. BATES *v.* DICKSON, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 961, Misc. OPPENHEIMER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 962, Misc. RHOADS *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 965, Misc. DAWKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 324 F. 2d 521.

Rehearing Denied.

No. 17. HUMPHREY ET AL. *v.* MOORE ET AL.; and

No. 18. GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION No. 89, *v.* MOORE ET AL., 375 U. S. 335;

No. 560. LANZA ET AL. *v.* NEW JERSEY, 375 U. S. 451;

No. 601. STICKLER *v.* OHIO, 375 U. S. 438;

No. 632. HARRIS *v.* NORFOLK SOUTHERN RAILWAY, 375 U. S. 985;

No. 647. CLARK *v.* WASHINGTON STATE BAR ASSOCIATION, 375 U. S. 986; and

No. 623, Misc. BYRD *v.* UNITED STATES, 375 U. S. 988. Petitions for rehearing denied.

No. 377, Misc. PAIGE *v.* UNITED STATES, 375 U. S. 864. Motion for leave to file petition for rehearing denied.

MARCH 2, 1964.

Miscellaneous Orders.

No. 36. UNITED STATES *v.* FIRST NATIONAL BANK & TRUST CO. OF LEXINGTON ET AL. Appeal from the United States District Court for the Eastern District of Kentucky. (Probable jurisdiction noted, 374 U. S. 824.) The motion of appellees to remand is denied. *Robert M. Odear, Gladney Harville, Rufus Lisle* and *Clinton M. Harbison* on the motion. *Solicitor General Cox* for the United States.

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No. 112. HARDY *v.* UNITED STATES, 375 U. S. 277. The motion for modification of the opinion is denied. *Mozart G. Ratner* for petitioner on the motion.

No. 321. ARATANI ET AL. *v.* KENNEDY, ATTORNEY GENERAL. Certiorari, 375 U. S. 877, to the United States Court of Appeals for the District of Columbia Circuit. The joint motion for reference to District Court to approve compromise settlement is granted. *Thomas H. Carolan* and *Philip W. Amram* for petitioners. *Solicitor General Cox* for respondent.

No. 384. PUBLISHERS' ASSOCIATION OF NEW YORK CITY *v.* NEW YORK MAILERS' UNION NUMBER SIX. Certiorari, 375 U. S. 901, to the United States Court of Appeals for the Second Circuit. Further consideration of the suggestion of mootness is postponed pending the hearing on the merits. *Gerhard P. Van Arkel* and *George Kaufmann* for respondent on the suggestion of mootness. *Andrew L. Hughes* for petitioner, in opposition.

No. 612. ADDISON ET AL. *v.* UNITED STATES. (Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied, *ante*, p. 905.) The application to stay issuance of the order denying the petition for certiorari is denied. *James L. Guilmartin, Stanley Jay Bartel* and *Fuller Warren* on the application.

Certiorari Granted. (*See No. 85, ante, p. 221, and No. 677, ante, p. 224.*)

Certiorari Denied. (*See also No. 732, ante, p. 221.*)

No. 728. HURWITZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry Dow* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *L. W. Post* for the United States. Reported below: 320 F. 2d 911.

No. 683. WATERMAN STEAMSHIP CORP. *v.* ODOM. C. A. 5th Cir. Certiorari denied. *T. K. Jackson, Jr.* for petitioner. *Michael J. Salmon* for respondent. Reported below: 322 F. 2d 1022.

No. 722. BURRELL *v.* UNITED STATES; and

No. 913, Misc. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Palmer K. Ward* for petitioner in No. 722. Petitioner *pro se* in No. 913, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 324 F. 2d 115.

No. 739. MIGUEL ET AL. *v.* JUSTICES OF THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, ET AL. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Frederic A. Johnson* and *Rudolph Lion Zalowitz* for petitioners. *Frank S. Hogan* and *H. Richard Uviller* for respondents.

No. 752. MARTIN *v.* STRAITZ, GUARDIAN, ET AL. Supreme Court of Florida. Certiorari denied. *Earl R. Stanley* for petitioner. Reported below: 156 So. 2d 861.

No. 755. ESTATE OF DAVENPORT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Charles B. Markham* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Robert A. Bernstein* for respondent. Reported below: 321 F. 2d 908.

No. 759. MUNTON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. *Stanley Mosk*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Calvin W. Torrance*, Deputy Attorney General, for respondent. Reported below: 218 Cal. App. 2d 556, 32 Cal. Rptr. 508.

No. 757. MARQUETTE CASUALTY CO. *v.* PHOENIX ASSURANCE CO. OF NEW YORK ET AL. C. A. 5th Cir. Certiorari denied. *James J. Morrison* for petitioner. Reported below: 320 F. 2d 486.

No. 760. SPORTSERVICE CORPORATION ET AL. *v.* NORTHERN ILLINOIS DEVELOPMENT CORP. C. A. 7th Cir. Certiorari denied. *Edward J. Kelly* and *John T. Coburn* for petitioners. *Wayland B. Cedarquist* for respondent. Reported below: 324 F. 2d 104.

No. 768. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 324 F. 2d 804.

No. 770. BETHLEHEM STEEL CO. *v.* SAMUELSON. C. A. 5th Cir. Certiorari denied. *W. Brown Morton, Jr.* and *Stanton T. Lawrence, Jr.* for petitioner. *James F. Weiler* for respondent. Reported below: 323 F. 2d 944.

No. 773. GENERAL RADIO CO. *v.* SUPERIOR ELECTRIC CO. C. A. 3d Cir. Certiorari denied. *Robert H. Rines* for petitioner. *Stephen H. Philbin* for respondent. Reported below: 321 F. 2d 857.

No. 776. MOSES H. CONE MEMORIAL HOSPITAL ET AL. *v.* SIMKINS ET AL. C. A. 4th Cir. Certiorari denied. *Charles E. Roth* and *Thornton H. Brooks* for petitioners. *Jack Greenberg, James M. Nabrit III* and *Conrad O. Pearson* for Simkins et al., respondents. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* filed a memorandum for the United States. Reported below: 323 F. 2d 959.

No. 928, Misc. ASHWELL *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 781. MOORE *v.* MATHIS ET AL. Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Certiorari denied. *Fred S. Abney* for petitioner. *Edward C. Fritz* for respondents. Reported below: 369 S. W. 2d 450.

No. 783. STORY ET AL. *v.* YORK. C. A. 9th Cir. Certiorari denied. *Arthur L. Martin* and *Bonnie Lee Martin* for petitioners. Reported below: 324 F. 2d 450.

No. 789. ALLIS-CHALMERS MANUFACTURING CO. ET AL. *v.* COMMONWEALTH EDISON CO. ET AL. C. A. 7th Cir. Certiorari denied. *John Paul Stevens, Edward R. Johnston, Holmes Baldridge, Sydney G. Craig, Charles M. Price, Robert C. Keck, Owen Rall, Earl E. Pollock, John T. Chadwell, Richard M. Keck, Jean Engstrom, W. Donald McSweeney, Edward R. Adams, Harold T. Halfpenny, Hammond E. Chaffetz* and *William H. Van Oosterhout* for petitioners. *Charles A. Bane* for respondents. Reported below: 323 F. 2d 412.

No. 989, Misc. WEAVER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 326 F. 2d 353.

Rehearing Denied.

No. 236. WALKER ET AL. *v.* LOUISIANA EX REL. JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES, 375 U. S. 393;

No. 589, Misc. MILNE *v.* MARYLAND, 375 U. S. 925; and

No. 804, Misc. LOPEZ *v.* CALIFORNIA, 375 U. S. 994. Petitions for rehearing denied.

No. 456. ETCHEVERRY *v.* UNITED STATES, 375 U. S. 930, 989. Motion for leave to file second petition for rehearing denied.

MARCH 9, 1964.

Miscellaneous Orders.

No. 33. ANDERSON *v.* KENTUCKY. Certiorari, 371 U. S. 886, to the Court of Appeals of Kentucky. By joint agreement of the parties this case is continued indefinitely.

No. 210. FALLEN *v.* UNITED STATES. Certiorari, 374 U. S. 826, to the United States Court of Appeals for the Fifth Circuit. IT IS ORDERED that *Isaac N. Groner, Esquire,* of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case and it is further ordered that *William B. Killian, Esquire,* is hereby relieved of further responsibility in this case.

No. 386. FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL. Certiorari, 375 U. S. 902, to the United States Court of Appeals for the Tenth Circuit. The motion of the People of the State of California and Public Utilities Commission of California for leave to file a brief, as *amici curiae,* is granted. *J. Calvin Simpson* and *John T. Murphy* on the motion. *Alfred C. DeCrane, Jr., W. W. Heard, Wm. H. Emerson, William J. Grove, Thomas H. Wall* and *Carroll L. Gilliam* for respondents, in opposition.

No. 623. CALHOUN ET AL. *v.* LATIMER ET AL. Certiorari, 375 U. S. 983, to the United States Court of Appeals for the Fifth Circuit. The motion of the Solicitor General, on behalf of the United States, for leave to participate in the oral argument, as *amicus curiae,* is granted and thirty minutes are allotted for that purpose. Counsel for the respondents are allotted an additional thirty minutes for oral argument.

No. 1016, Misc. MEDLEY *v.* OREGON ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 508. LUCAS ET AL. *v.* FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO ET AL. Appeal from the United States District Court for the District of Colorado. (Probable jurisdiction noted, 375 U. S. 938.) The motion of the Solicitor General, on behalf of the United States, for leave to participate in the oral argument, as *amicus curiae*, is granted and thirty minutes are allotted for that purpose. Counsel for the appellees are allotted an additional thirty minutes for oral argument.

No. 592. GRIFFIN ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL. Certiorari, 375 U. S. 391, to the United States Court of Appeals for the Fourth Circuit. The motion of the Solicitor General, on behalf of the United States, for leave to participate in the oral argument, as *amicus curiae*, is granted and thirty minutes are allotted for that purpose. Counsel for the respondents are allotted an additional thirty minutes for oral argument.

No. 1024, Misc. KANE *v.* MCMANN, WARDEN;
No. 1039, Misc. CASPER *v.* TAHASH, WARDEN;
No. 1060, Misc. BASSETT *v.* BALKCOM, WARDEN; and
No. 1080, Misc. MITCHELL *v.* ATTORNEY GENERAL.
Motions for leave to file petitions for writs of habeas corpus denied.

No. 1063, Misc. MCINTOSH *v.* HOOPER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 710. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. Appeal from the United States District Court for the Eastern District of Wisconsin. The motion to strike the memorandum of the Solicitor General is denied.

Probable jurisdiction noted. *Jordan Jay Hillman* and *John C. Danielson* for appellant. *Philip H. Porter* and *R. K. Merrill* for appellees. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane* and *Arthur Cerra* filed a memorandum for the United States and the Interstate Commerce Commission in support of appellant. Reported below: 214 F. Supp. 244.

Certiorari Granted. (*See also No. 561, ante, p. 354, and No. 571, ante, p. 356.*)

No. 775. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* WITTSTEIN ET AL. C. A. 2d Cir. Certiorari granted. THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Henry Kaiser, Eugene Gressman, George Kaufmann* and *David I. Ashe* for petitioners. *Godfrey P. Schmidt* for respondents. *David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Michael H. Gottesman* for Industrial Union Department, AFL–CIO, as *amicus curiae,* in support of the petition. Reported below: 326 F. 2d 26.

No. 804. FARMER *v.* ARABIAN AMERICAN OIL CO.; and No. 808. ARABIAN AMERICAN OIL CO. *v.* FARMER. C. A. 2d Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *Kalman I. Nulman* and *William V. Homans* for petitioner in No. 804. *Chester Bordeau* for petitioner in No. 808. Reported below: 324 F. 2d 359.

Certiorari Denied.

No. 799. CENTRAL LOUISIANA ELECTRIC CO., INC., ET AL. *v.* MOSES ET AL. C. A. 5th Cir. Certiorari denied. *W. Ford Reese* for petitioners. *H. Alva Brumfield* for respondents. Reported below: 324 F. 2d 69.

No. 655. PEARLMAN ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Joseph Forer* and *Harold Buchman* for petitioners. *Thomas B. Finan*, Attorney General of Maryland, *Robert C. Murphy*, Deputy Attorney General, and *Robert S. Bourbon*, Special Assistant Attorney General, for respondent. Reported below: 232 Md. 251, 192 A. 2d 767.

No. 703. SKOKOMISH TRIBE OF INDIANS *v.* FRANCE ET AL. C. A. 9th Cir. Certiorari denied. *Malcolm Stewart McLeod* and *Frederick Paul* for petitioner. *Marshall McCormick* and *Paul J. Nolan* for the City of Tacoma; *F. Joseph Donohue* for Simpson Logging Co.; and *William E. Evenson* for Carlson et al., respondents. Reported below: 320 F. 2d 205.

No. 765. SCHAEFFER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *F. W. Durnan* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Elizabeth Dudley* for the United States. Reported below: 319 F. 2d 907.

No. 779. REKEWEG, GUARDIAN, ET AL. *v.* FEDERAL MUTUAL INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied. *J. Gareth Hitchcock* and *Howard S. Grimm* for petitioners. *Leigh L. Hunt* for respondents. Reported below: 324 F. 2d 150.

No. 854. CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF COLCHESTER, HAMDEN, HANCOCK, WALTON, ANDES AND TOMPKINS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Francis R. Paternoster* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Julius L. Sackman* for respondent. Reported below: See 18 App. Div. 2d 943, 237 N. Y. S. 2d 682.

No. 806. STEWART-WARNER CORP. *v.* CANADIAN WESTINGHOUSE CO., LTD. C. A. 2d Cir. Certiorari denied. *Augustus G. Douvas* and *Edwin T. Bean* for petitioner. *Ralph H. Swingle* and *Charles K. Rice* for respondent. Reported below: 325 F. 2d 822.

No. 711. UNITED STATES ET AL. *v.* WILSON & COMPANY, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *Ralph S. Spritzer* for the United States; and *Max D. Paglin* and *Daniel R. Ohlbaum* for the Federal Communications Commission. *Charles A. Bane* and *Sharon L. King* for Wilson & Company et al.; and *Kenneth F. Burgess, Howard P. Robinson* and *Howard J. Trienens* for American Telephone & Telegraph Co. et al., respondents.

No. 786. FITZGERALD ET AL. *v.* UNITED STATES. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *John J. Sullivan* and *Aaron Kravitch* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 324 F. 2d 153.

No. 675, Misc. MARXHAUSEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 689, Misc. KNICKER *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

No. 711, Misc. THOMAS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 765, Misc. WOOD *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. *James G. Moore* for petitioner.

No. 947, Misc. KUCHTA *v.* RICE ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 969, Misc. OAKLEY *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 975, Misc. ELLIS *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 386 P. 2d 326.

No. 977, Misc. HOOPER *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 323 F. 2d 995.

No. 988, Misc. JOHNSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 991, Misc. POLLOCK *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1006, Misc. KIRBY *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 1007, Misc. MOORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 29 Ill. 2d 364, 194 N. E. 2d 356.

No. 1008, Misc. GILCREASE *v.* MAXWELL, REFORMATORY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1012, Misc. MURGIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1018, Misc. APONTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 325 F. 2d 714.

No. 1020, Misc. WISNER *v.* MARYLAND. Baltimore City Court, Maryland. Certiorari denied.

No. 1028, Misc. LAWRENCE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 29 Ill. 2d 426, 194 N. E. 2d 337.

No. 1064, Misc. YOUNG *v.* KROPP, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

Rehearing Denied.

No. 400, Misc. ROGERS *v.* UNITED STATES, *ante*, p. 916;

No. 817, Misc. WINHOVEN *v.* CALIFORNIA, 375 U. S. 994;

No. 839, Misc. HITCHCOCK *v.* EYMAN, WARDEN, ET AL., *ante*, p. 924;

No. 847, Misc. STELLO ET AL. *v.* STRAND ET AL., *ante*, p. 924; and

No. 875, Misc. TANSIMORE *v.* ANDERSON, *ante*, p. 903. Petitions for rehearing denied.

No. 519. SHERWIN *v.* UNITED STATES, 375 U. S. 964. Motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

MARCH 23, 1964.

Order Appointing Deputy Clerk.

It is ordered that Michael Rodak, Jr. be, and he hereby is, appointed a Deputy Clerk of this Court.

Miscellaneous Orders.

No. 400. GARRISON *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. (Probable jurisdiction noted, 375 U. S. 900.) The motion of appellant to remove the case from the summary calendar is denied. *Eberhard P. Deutsch* on the motion.

No. 468. GALANTE *v.* UNITED STATES. (Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied, 375 U. S. 940.) The Solicitor General is requested to file a response to the petition for rehearing in this case within fifteen days.

No. 775. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* WITTSTEIN ET AL. Certiorari, *ante*, p. 942, to the United States Court of Appeals for the Second Circuit. The motion of petitioners to advance is denied. THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion. *Henry Kaiser, Eugene Gressman* and *George Kaufmann* on the motion.

No. 1045, Misc. MARTINEZ *v.* MADIGAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. *Morris Lavine* for petitioner.

No. 1058, Misc. SIMS *v.* CAVELL, CORRECTIONAL SUPERINTENDENT; and

No. 1106, Misc. POWERS *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 966, Misc. NATIONAL COUNCIL ON THE FACTS OF OVERPOPULATION *v.* SIRICA, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *A. Lincoln Green* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for respondent.

No. 968, Misc. DI SILVESTRO *v.* LUMBARD, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for respondents.

No. 1023, Misc. CUSHMAN MOTOR DELIVERY CO. ET AL. *v.* DUFFY, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *David Silbert, Lester Asher* and *Bernard Dunau* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, as *amicus curiae*, in opposition.

Certiorari Granted.

No. 828. SECURITIES AND EXCHANGE COMMISSION *v.* AMERICAN TRAILER RENTALS CO. C. A. 10th Cir. Certiorari granted. *Solicitor General Cox, Philip A. Loomis, Jr.* and *David Ferber* for petitioner. *Arthur W. Burke, Jr.* for respondent. Reported below: 325 F. 2d 47.

No. 763. WHITNEY NATIONAL BANK IN JEFFERSON PARISH *v.* BANK OF NEW ORLEANS & TRUST CO. ET AL.; and

No. 798. SAXON, COMPTROLLER OF THE CURRENCY, *v.* BANK OF NEW ORLEANS & TRUST CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. The cases are consolidated

and a total of two hours is allotted for oral argument. *Dean Acheson, W. Graham Claytor, Jr.* and *Brice M. Clagett* for petitioner in No. 763. *Solicitor General Cox, Morton Hollander* and *David L. Rose* for petitioner in No. 798. *Edward L. Merrigan* and *James W. Bean* for Bank of New Orleans & Trust Co. et al., and *Bentley G. Byrnes,* Special Assistant Attorney General of Louisiana, for the State Bank Commissioner of Louisiana, respondents in both cases. Reported below: 116 U. S. App. D. C. 285, 323 F. 2d 290.

No. 763, Misc. TURNER *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. The motion for leave to proceed *in forma pauperis* is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted. The case is transferred to the appellate docket. *Burrell J. Carter* for appellant. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Michael E. Culligan,* Assistant Attorney General, for appellee. Reported below: 244 La. 447, 152 So. 2d 555.

Certiorari Denied. (*See also No. 57, ante, p. 513.*)

No. 52. NEW YORK TIMES CO. *v.* PARKS ET AL. C. A. 5th Cir. Certiorari denied. *Herbert Brownell, Thomas F. Daly, Louis M. Loeb, Herbert Wechsler* and *Ronald S. Diana* for petitioner. *Sam Rice Baker, M. R. Nachman, Jr., Ralph Smith* and *Calvin M. Whitesell* for respondents. Reported below: 308 F. 2d 474.

No. 672. IGNERI ET UX. *v.* CIE. DE TRANSPORTS OCEANIQUES. C. A. 2d Cir. Certiorari denied. *Philip F. DiCostanzo* and *Robert Klonsky* for petitioners. *Robert J. Giuffra* for respondent. Reported below: 323 F. 2d 257.

No. 709. GORSUCH ET AL. *v.* DEPINTO ET AL.;

No. 790. DUHAME *v.* PROVIDENT SECURITY LIFE INSURANCE CO. ET AL.; and

No. 802. DEPINTO *v.* PROVIDENT SECURITY LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. *James Wm. Moore, William Lee McLane* and *Nola McLane* for petitioners in No. 709. *John P. Otto* for petitioner in No. 790 and respondent Duhame in No. 709. *William A. Evans* and *Jos. S. Jenckes, Jr.* for petitioner in No. 802 and respondent DePinto in No. 709. *Wellington D. Rankin* for respondent Landoe in No. 709. Reported below: 323 F. 2d 826.

No. 717. GORSUCH *v.* PROVIDENT SECURITY LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. *William Lee McLane* and *Nola McLane* for petitioner. *John R. Franks* for respondent. Reported below: 323 F. 2d 839.

No. 737. HARDAWAY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 321 F. 2d 89.

No. 742. KAISER ET AL. *v.* NEW JERSEY. Superior Court of New Jersey, Appellate Division. Certiorari denied. *John J. Corcoran, Jr.* for petitioners. *Guy W. Calissi* for respondent. Reported below: 80 N. J. Super. 176, 193 A. 2d 270.

No. 777. AFFILIATED GOVERNMENT EMPLOYEES' DISTRIBUTING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Edward L. Butterworth* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 322 F. 2d 872.

No. 778. FEDERAL EMPLOYEES' DISTRIBUTING CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edward L. Butterworth* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 322 F. 2d 891.

No. 788. TUGWELL *v.* A. F. KLAVENESS & CO. C. A. 5th Cir. Certiorari denied. *W. A. Combs* for petitioner. *W. C. Harvin* for respondent. Reported below: 320 F. 2d 866.

No. 792. HILTON HOTELS ET AL. *v.* WEAVER, ADMINISTRATOR, HOUSING AND HOME FINANCE AGENCY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton V. Freeman* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Harvey L. Zuckman* for respondent. Reported below: 117 U. S. App. D. C. 83, 325 F. 2d 1010.

No. 795. TAYLOR ET AL. *v.* JOHNSON, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari denied. *Stewart R. Jaffy* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board; and *Jack G. Evans* and *Robert W. Newlon* for Johnson, respondents. Reported below: 322 F. 2d 216.

No. 807. UNITED AIRCRAFT CORP., PRATT & WHITNEY AIRCRAFT DIVISION, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Gerard D. Reilly* and *Joseph C. Wells* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 324 F. 2d 128.

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No. 796. LOYAL PROTECTIVE LIFE INSURANCE CO. *v.* MONARCH LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. *Donald M. Dunn* and *Eugene Z. DuBose* for petitioner. *Herbert Brownell* for respondent. Reported below: 326 F. 2d 841.

No. 805. AKSHUN MANUFACTURING CO. ET AL. *v.* NORTH STAR ICE EQUIPMENT CO. C. A. 7th Cir. Certiorari denied. *William VanDercreek* for petitioners. *John Rex Allen* for respondent. Reported below: See 301 F. 2d 882.

No. 809. PETRUSHANSKY, ALIAS GREEN, *v.* MARASCO, U. S. MARSHAL. C. A. 2d Cir. Certiorari denied. *Edwin Gold* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 325 F. 2d 562.

No. 810. SELIGSOHN *v.* PHILADELPHIA PARKING AUTHORITY ET AL. Supreme Court of Pennsylvania. Certiorari denied. *David Berger* for petitioner. *Harry Shapiro, Samuel D. Goodis* and *John R. McConnell* for respondents. Reported below: 412 Pa. 372, 194 A. 2d 606.

No. 814. AMERICAN EXPORT LINES, INC., ET AL. *v.* PROVENZA. C. A. 4th Cir. Certiorari denied. *William A. Grimes* and *Richard W. Case* for petitioners. *John J. O'Connor, Jr.* for respondent. Reported below: 324 F. 2d 660.

No. 820. SICA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 325 F. 2d 831.

No. 816. BERSTEIN, ALIAS BERNS, *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. *Bernard J. Mellman* for petitioner. Reported below: 372 S. W. 2d 57.

No. 825. TWILLEGEAR ET AL. *v.* QUINCY COLUMBIA BASIN IRRIGATION DISTRICT ET AL. Supreme Court of Washington. Certiorari denied. *Florence Mayne Merrick* for petitioners. *James Leavy* for respondents. Reported below: 63 Wash. 2d 115, 385 P. 2d 715.

No. 837. RICE ET AL. *v.* RINGSBY TRUCK LINES ET AL. C. A. 7th Cir. Certiorari denied. *Sidney Z. Karasik* for petitioners. *Joseph H. Hinshaw* and *Oswell G. Treadway* for respondents. Reported below: 324 F. 2d 146.

No. 839. GALLO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frank Serri* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 579, Misc. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Arthur Warner* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 318 F. 2d 450.

No. 736, Misc. CASTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 319 F. 2d 850.

No. 791, Misc. BOYD *v.* DIAMOND. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 743. SOUTHERN PILOTS ASSOCIATION ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Philip F. Herrick* and *Nicholas E. Allen* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Joseph B. Goldman, O. D. Ozment* and *Peter B. Schwarzkopf* for the Civil Aeronautics Board; and *Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for Air Line Pilots Association, respondents. Reported below: 116 U. S. App. D. C. 283, 323 F. 2d 288.

No. 815. STRACHAN SHIPPING CO. *v.* KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Robert Eikel* for petitioner. Reported below: 324 F. 2d 746.

No. 792, Misc. TIDMORE *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 323 F. 2d 88.

No. 806, Misc. PEEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hugh R. Manes* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 321 F. 2d 934.

No. 815, Misc. HUERTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 322 F. 2d 1.

No. 846, Misc. ENOS *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 116 U. S. App. D. C. 134, 321 F. 2d 747.

No. 869, Misc. BURDETTE *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent.

No. 882, Misc. CANTRELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 116 U. S. App. D. C. 311, 323 F. 2d 613.

No. 890, Misc. BERLING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Richard P. Tinkham, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 324 F. 2d 249.

No. 892, Misc. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 323 F. 2d 729.

No. 945, Misc. REAGAN *v.* SINCLAIR REFINING Co. C. A. 5th Cir. Certiorari denied. *W. A. Combs* for petitioner. *Leroy Denman Moody* for respondent. Reported below: 319 F. 2d 363.

No. 946, Misc. DE LUCIA *v.* UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 325 F. 2d 718.

No. 951, Misc. PATTERSON *v.* VIRGINIA ELECTRIC & POWER Co. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 204 Va. 574, 132 S. E. 2d 436.

No. 952, Misc. BURNS *v.* KANSAS. Supreme Court of Kansas. Certiorari denied.

No. 971, Misc. PATTON *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Claude F. Seila* for petitioner. Reported below: 260 N. C. 359, 132 S. E. 2d 891.

No. 980, Misc. IN RE OPPENHEIMER. Supreme Court of California. Certiorari denied.

No. 981, Misc. MULLIGAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 1001, Misc. O'KELLY *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Lewis R. Ricketts* for petitioner. Reported below: 175 Neb. 798, 124 N. W. 2d 211.

No. 972, Misc. PATE *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. *Melvin L. Wulf* for petitioner. *Charles Nesbitt*, Attorney General of Oklahoma, and *Jack A. Swidensky*, Assistant Attorney General, for respondent. Reported below: 325 F. 2d 567.

No. 990, Misc. CLEGGETT *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 995, Misc. STAPLES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Josiah Lyman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 117 U. S. App. D. C. 162, 327 F. 2d 860.

No. 996, Misc. PUETT *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *John H. Witherspoon* for the City of Detroit et al., and *Aloysius J. Suchy* for Mosgrove, respondents. Reported below: 323 F. 2d 591.

No. 1000, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 116 U. S. App. D. C. 404, 324 F. 2d 436.

No. 1002, Misc. ALLISON *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent. Reported below: 326 F. 2d 294.

No. 997, Misc. BELL *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 970, Misc. WRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 323 F. 2d 653.

No. 1003, Misc. YOUNG *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1015, Misc. HILL *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1021, Misc. LUPO *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner.

No. 1026, Misc. GORDON *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1027, Misc. MOORE *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1030, Misc. KOENIG *v.* WILLINGHAM, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 324 F. 2d 62.

No. 1038, Misc. DOMANSKI *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 6th Cir. Certiorari denied. *Geo. W. Crockett, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *John C. Eldridge* for respondent. Reported below: 323 F. 2d 882.

No. 1053, Misc. MIZE *v.* CROUSE, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se*. *William M. Ferguson,* Attorney General of Kansas, for respondent.

No. 1070, Misc. CAUSEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 220 Cal. App. 2d 641, 34 Cal. Rptr. 43.

No. 1086, Misc. WALTREUS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 219 Cal. App. 2d 561, 33 Cal. Rptr. 369.

No. 776, Misc. BERRY *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 116 U. S. App. D. C. 375, 324 F. 2d 407.

Rehearing Denied.

No. 96. WRIGHT ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL., *ante*, p. 52;

No. 554. POPEIL BROTHERS, INC., *v.* ZYSSET ET AL., *ante*, p. 913;

No. 687. ROEHNER *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *ante*, p. 909;

No. 777, Misc. HOMCHAK *v.* NEW YORK ET AL., *ante*, p. 919;

No. 784, Misc. STILTNER *v.* WASHINGTON ET AL., *ante*, p. 920;

No. 790, Misc. WALKER *v.* KONITZER ET AL., *ante*, p. 921;

No. 854, Misc. DONNELL *v.* NASH, WARDEN, *ante*, p. 924;

No. 916, Misc. SLIVA *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, *ante*, p. 927; and

No. 950, Misc. MACFADDEN *v.* ALAMEDA CITY POLICE COURT ET AL., *ante*, p. 903. Petitions for rehearing denied.

No. 574. WILLIAMSON ET AL., EXECUTORS, *v.* PEURIFOY, JUDGE, 375 U. S. 967. Motion for leave to file petition for rehearing denied.

MARCH 30, 1964.

Miscellaneous Orders.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. The motion of Life Insurance Association of America for leave to file a brief, as *amicus curiae,* is granted. This case is set for argument on the Report of the Special Master and the exceptions thereto. Two hours are allotted for oral argument. *William B. McElhenny* and *Warren Elliott* on the motion. [For earlier orders herein, see 369 U. S. 869; 370 U. S. 929; 371 U. S. 873; 372 U. S. 926, 973; 375 U. S. 928.]

No. 402. J. I. CASE CO. ET AL. *v.* BORAK. Certiorari, 375 U. S. 901, to the United States Court of Appeals for the Seventh Circuit. The motion of the Solicitor General, on behalf of the Securities and Exchange Commission, for leave to participate in oral argument, as *amicus curiae,* is granted, and fifteen minutes are allotted for that purpose.

No. 592. GRIFFIN ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL. Certiorari, 375 U. S. 391, to the United States Court of Appeals for the Fourth Circuit. The motion of the National Education Association for leave to file a brief, as *amicus curiae,* is granted. The motion of the City of Charlottesville for leave to participate in oral argument, as *amicus curiae,* is denied. *William B. Beebe* and *Hershel Shanks* for the National Education Association. *George Stephen Leonard, Paul D. Summers, Jr., D. B. Marshall* and *Richard L. Hirshberg* for the City of Charlottesville.

No. 718. GROVE PRESS, INC., *v.* GERSTEIN ET AL. On petition for writ of certiorari to the District Court of Appeal of Florida, Third District. The motion to advance is denied. *Edward de Grazia* and *Richard Yale Feder* for petitioner on the motion.

No. 1114, Misc. MCHENRY *v.* MICHIGAN;

No. 1127, Misc. MOSNAR *v.* EYMAN, WARDEN, ET AL.; and

No. 1142, Misc. MCCANN *v.* MAXWELL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 719. ALL STATES FREIGHT, INC., ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. Appeal from the United States District Court for the District of Connecticut. Probable jurisdiction noted. *John S. Fessenden* and *Homer S. Carpenter* for appellants. *Edward A. Kaier, Robert G. Bleakney, Jr., John A. Daily* and *Thomas P. Hackett* for appellees. *Solicitor General Cox* and *Robert W. Ginnane* filed a memorandum for the United States and the Interstate Commerce Commission. Reported below: 221 F. Supp. 370.

Certiorari Granted. (*See also No. 793, ante, p. 650.*)

No. 813. UDALL, SECRETARY OF THE INTERIOR, *v.* TALLMAN ET AL. Motion of Richfield Oil Corp. et al. for leave to file a brief, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *Solicitor General Cox, Wayne G. Barnett, Stephen J. Pollak, Roger P. Marquis* and *Edmund B. Clark* for petitioner. *Charles F. Wheatley, Jr.* and *Robert L. McCarty* for respondents. *William J. DeMartini, Gordon A. Goodwin, Joseph A. Ball, Abe Fortas, Clark M. Clifford, Clayton L. Orn, Mar-*

vin J. Sonosky, Oscar L. Chapman, Martin L. Friedman and *Marion B. Plant* for Richfield Oil Corp. et al., as *amici curiae*, in support of the petition. Reported below: 116 U. S. App. D. C. 379, 324 F. 2d 411.

Certiorari Denied. (*See also No. 767, ante, p. 647; No. 800, ante, p. 648; and No. 812, ante, p. 649.*)

No. 751. COSMARK ET AL. *v.* STRUTHERS WELLS CORP. ET AL. Supreme Court of Pennsylvania. Certiorari denied. *George J. Barco* and *Yolandá G. Barco* for petitioners. *John C. Bane, Jr.* and *John G. Wayman* for Struthers Wells Corp., and *Louis Sherman* and *Laurence J. Cohen* for International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL–CIO, et al., respondents. Reported below: 412 Pa. 211, 194 A. 2d 325.

No. 821. KLINE *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *Harry H. Peterson* and *Albert E. Jenner, Jr.* for petitioner. *Walter F. Mondale*, Attorney General of Minnesota, and *Sydney Berde*, Special Assistant Attorney General, for respondent. Reported below: 266 Minn. 372, 124 N. W. 2d 416.

No. 824. CISIN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Penrose Lucas Albright* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States.

No. 833. STEINSCHREIBER, DOING BUSINESS AS SIDCAPS LABORATORIES, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham S. Robinson, Alexander Dreiband* and *Herbert Alan Johnson* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 326 F. 2d 759.

No. 829. WALLER *v.* NEW AMSTERDAM CASUALTY CO. C. A. 4th Cir. Certiorari denied. *Charles B. Nye* for petitioner. Reported below: 323 F. 2d 20.

No. 831. ALGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William C. Erbecker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 325 F. 2d 502.

No. 841. HOISTING & PORTABLE ENGINEERS, LOCAL UNION No. 701, OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. *v.* GILBERT ET AL. Supreme Court of Oregon. Certiorari denied. *Clifford D. O'Brien* for petitioners. Reported below: 237 Ore. 130, 384 P. 2d 136.

No. 843. NICK *v.* STATE HIGHWAY COMMISSION OF WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Elliot N. Walstead* for petitioner. *George Thompson*, Attorney General of Wisconsin, *Lyle E. Strahan*, Deputy Attorney General, *A. J. Feifarek*, Assistant Attorney General, and *George Brunner Schwahn* for respondent. Reported below: 21 Wis. 2d 489, 124 N. W. 2d 574.

No. 857. TROST *v.* AMERICAN HAWAIIAN STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *Harvey Goldstein* for petitioner. *Gray Williams* for respondent. Reported below: 324 F. 2d 225.

No. 905. ANTHONY *v.* COUNTY OF LOS ANGELES. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Leonidas P. Econom* for petitioner. *Harold W. Kennedy* for respondent. Reported below: 224 Cal. App. 2d 103, 36 Cal. Rptr. 308.

No. 725. PAN AMERICAN WORLD AIRWAYS, INC., *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION 1780, ET AL.; and

No. 827. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION 1780, ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jesse Freidin, Murray Gartner* and *Herbert Prashker* for petitioner in No. 725. *Louis Sherman, Joseph A. Sickles* and *Laurence J. Cohen* for Building & Construction Trades Council et al.; and *Roland C. Davis* for Culinary Workers Union, Local 226, respondents in No. 725. *Asher W. Schwartz* and *John F. O'Donnell* for Transport Workers Union of America, AFL–CIO, as *amicus curiae,* in support of the petition in No. 725. *Solicitor General Cox* for the United States, as *amicus curiae,* in opposition in No. 725. *Louis Sherman, Joseph A. Sickles* and *Laurence J. Cohen* for petitioners in No. 827. *Jesse Freidin* and *Herbert Prashker* for respondent in No. 827. Reported below: 324 F. 2d 217.

No. 822. GOTTHILF *v.* SILLS ET AL. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *O. John Rogge* for petitioner. *Theodore Charnas* for respondents.

No. 754. UNITED STATES *v.* SEALS. Motion of the respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Solicitor General Cox* and *Assistant Attorney General Miller* for the United States. *William E. Stewart, Jr.* and *Peter R. Cella, Jr.* for respondent. Reported below: 117 U. S. App. D. C. 79, 325 F. 2d 1006.

No. 857, Misc. TWINING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas C. Wicker, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 321 F. 2d 432.

No. 895, Misc. WUCKICH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 896, Misc. JOHNSON *v.* DOWD, WARDEN. Supreme Court of Indiana. Certiorari denied. Reported below: 244 Ind. 496, 193 N. E. 2d 906.

No. 911, Misc. JOHNSON *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney*, Deputy Assistant Attorney General, for respondent.

No. 1034, Misc. MASTRIAN *v.* HEDMAN, SHERIFF, ET AL. C. A. 8th Cir. Certiorari denied. *Douglas W. Thomson* and *John A. Cochrane* for petitioner. Reported below: 326 F. 2d 708.

No. 1040, Misc. CALDERA *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied.

No. 1042, Misc. WILLIAMS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1067, Misc. ROGERS *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1068, Misc. CAMPLAIN *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied.

No. 1075, Misc. VINSON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1079, Misc. HART *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1083, Misc. BUSH *v.* ILLINOIS. SUPREME COURT OF ILLINOIS. Certiorari denied. Reported below: 29 Ill. 2d 367, 194 N. E. 2d 308.

No. 1129, Misc. CALLAHAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. *Frances Kahn* for petitioner. Reported below: 19 App. Div. 2d 889, 244 N. Y. S. 2d 766.

No. 2, Misc. SIMON *v.* MARONEY, WARDEN, ET AL. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Marjorie Hanson Matson* and *Rowland Watts* for petitioner. Reported below: 405 Pa. 562, 176 A. 2d 94.

Rehearing Denied.

No. 53. BROOKS *v.* MISSOURI PACIFIC RAILROAD CO., *ante*, p. 182;

No. 612. ADDISON ET AL. *v.* UNITED STATES, *ante*, p. 905;

No. 705. WHALEY *v.* UNITED STATES, *ante*, p. 911; and

No. 730. WISCONSIN & MICHIGAN STEAMSHIP CO. *v.* CORPORATION AND SECURITIES COMMISSION, *ante*, p. 912. Petitions for rehearing denied.

No. 624, Misc. STANDLEY *v.* UNITED STATES, *ante*, p. 917;

No. 818, Misc. FRANCO *v.* UNITED STATES, *ante*, p. 903;

No. 868, Misc. MAGEE ET AL. *v.* CALIFORNIA, *ante*, p. 925;

No. 902, Misc. DANDY *v.* MYERS, CORRECTIONAL SUPERINTENDENT, *ante*, p. 926; and

No. 941, Misc. KARL *v.* RICHARDSON, WARDEN, *ante*, p. 903. Petitions for rehearing denied.

MARCH 31, 1964.

Dismissal Under Rule 60.

No. 745. GIANT FOOD INC. *v.* FEDERAL TRADE COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Raymond R. Dickey* and *Bernard Gordon* for petitioner. *Solicitor General Cox* for respondent. Reported below: 116 U. S. App. D. C. 227, 322 F. 2d 977.

APRIL 6, 1964.

Miscellaneous Orders.

No. 39. NEW YORK TIMES CO. *v.* SULLIVAN; and

No. 40. ABERNATHY ET AL. *v.* SULLIVAN, *ante*, p. 254. The motion of respondent for the apportionment of printing costs and fees is denied. *Sam Rice Baker, M. Roland Nachman, Jr.* and *Calvin Whitesell* on the motion. *Herbert Wechsler* for New York Times Co., in opposition.

No. 1041, Misc. COPELAND *v.* SECRETARY OF STATE. On appeal from the United States District Court for the Southern District of New York. The motion of the appellant to advance is denied. *Leonard B. Boudin* on the motion.

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Nos. 379 and 380. PAN-AMERICAN LIFE INSURANCE CO. *v.* LORIDO. On petitions for writs of certiorari to the Supreme Court of Florida and the District Court of Appeal of Florida, Third District. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 481. VIKING THEATRE CORP. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL. Certiorari, 375 U. S. 939, to the United States Court of Appeals for the Third Circuit. The motion of Theatre Owners of America, Inc., et al. for leave to file a brief, as *amici curiae*, is granted. *Herman M. Levy* on the motion.

No. 1138, Misc. CREAGH *v.* MAXWELL, WARDEN, ET AL.; and

No. 1171, Misc. SCARBECK *v.* ANDERSON, JAIL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1168, Misc. MEACHNOR *v.* EYMAN, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 912, Misc. SPRINGFIELD *v.* SURGEON GENERAL OF THE UNITED STATES. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 1013, Misc. SHARP *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See No. 67, ante, p. 779; No. 68, ante, p. 781; No. 78, ante, p. 780; and No. 826, ante, p. 776.*)

Certiorari Denied. (*See also No. 1168, Misc., supra.*)

No. 731. GIANOPULOS *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Daniel P. Ward* and *Elmer C. Kissane* for respondent.

No. 830. STEVENS BROS. FOUNDATION, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *John M. Sullivan* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for respondent. Reported below: 324 F. 2d 633.

No. 847. BOYAJIAN, DOING BUSINESS AS PRECISION TESTING LABORATORIES, *v.* OLD COLONY ENVELOPE CO., INC., ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Eben M. Graves* for respondents.

No. 852. LAMAR, EXECUTRIX, *v.* BOOKWALTER, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *James J. Waters* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Benjamin M. Parker* for respondent. Reported below: 323 F. 2d 664.

No. 860. DES PLAINES CURRENCY EXCHANGE, INC., *v.* KNIGHT, DIRECTOR OF FINANCIAL INSTITUTIONS, ET AL. Supreme Court of Illinois. Certiorari denied. *Edward M. White* for petitioner. *Leonard D. Rutstein* for respondent Kane. Reported below: 29 Ill. 2d 244, 194 N. E. 2d 89.

No. 856. BROWN ET UX. *v.* PEARL RIVER VALLEY WATER SUPPLY DISTRICT. Supreme Court of Mississippi. Certiorari denied. *James P. Coleman* for petitioners. *L. Arnold Pyle* for respondent. Reported below: —— Miss. ——, 156 So. 2d 572.

No. 859. ISTHMIAN LINES, INC., ET AL. *v.* BALLWANZ, TO THE USE OF LIBERTY MUTUAL INSURANCE CO. C. A. 4th Cir. Certiorari denied. *William A. Grimes* and *Eugene A. Edgett, Jr.* for petitioners. *John J. O'Connor, Jr.* for respondent. Reported below: 319 F. 2d 457.

No. 864. WILLIAMS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Kenneth D. Wood, William H. Collins* and *James K. Hughes* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 865. BROWN ET AL. *v.* UNAUTHORIZED PRACTICE OF LAW COMMITTEE OF CUYAHOGA COUNTY, OHIO. Supreme Court of Ohio. Certiorari denied. *Alexander H. Martin, Jr.* for petitioners. *Merritt W. Green* for respondent. Reported below: 175 Ohio St. 149, 192 N. E. 2d 54.

No. 880. AIPLE, DOING BUSINESS AS AIPLE TOWING CO., *v.* CENTRAL SOYA CO., INC. C. A. 7th Cir. Certiorari denied. *John M. O'Connor, Jr.* for petitioner. *Stuart B. Bradley* for respondent. Reported below: 325 F. 2d 129.

No. 821, Misc. MASSENGALE *v.* MASSENGALE. Court of Common Pleas of Ohio, Hamilton County. Certiorari denied.

No. 893. UNITED MINE WORKERS OF AMERICA *v.* LOVE & AMOS COAL CO. Court of Appeals of Tennessee. Certiorari denied. *E. H. Rayson, R. R. Kramer* and *Harrison Combs* for petitioner. *J. Clarence Evans* and *John A. Rowntree* for respondent.

No. 660. SEATTLE BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* ROSLING ET AL. Supreme Court of Washington. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Hugh Hafer* and *Richard P. Donaldson* for petitioners. *DeWitt Williams* for respondents. Reported below: 62 Wash. 2d 905, 385 P. 2d 29.

No. 818. TIMKEN ROLLER BEARING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *John G. Ketterer* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 325 F. 2d 746.

No. 848. MICHALSKY *v.* CITY OF NEW YORK. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Reported below: 324 F. 2d 496.

No. 788, Misc. GOSNELL *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *C. Robert Sarver*, Assistant Attorney General, for respondent.

No. 841, Misc. JACOBS *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court for Baltimore County, Maryland. Certiorari denied.

No. 845, Misc. HUTCHINSON *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Deputy Attorney General, for respondent.

No. 907, Misc. PAIGE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Deputy Attorney General, for respondent.

No. 932, Misc. WALKER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, and *Edward A. Berman*, Assistant Attorney General, for respondent.

No. 943, Misc. BABER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Miller*, *Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 116 U. S. App. D. C. 358, 324 F. 2d 390.

No. 1054, Misc. KEITT *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Nanette Dembitz* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 1066, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 13 N. Y. 2d 201, 195 N. E. 2d 293.

No. 1074, Misc. HAYES *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *Lewis T. Booker* for petitioner. Reported below: 204 Va. 851, 134 S. E. 2d 271.

No. 764, Misc. OGDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Daniel G. Marshall* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 323 F. 2d 818.

No. 878, Misc. DURR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 28 Ill. 2d 308, 192 N. E. 2d 379.

Rehearing Denied.

No. 79. 2,872.88 ACRES OF LAND ET AL. *v.* UNITED STATES, *ante*, p. 192;

No. 108. SEARS, ROEBUCK & CO. *v.* STIFFEL COMPANY, *ante*, p. 225;

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No. 756. BADGER *v.* UNITED STATES, *ante*, p. 914;

No. 769. RODGERS *v.* BALTIMORE & OHIO RAILROAD CO., *ante*, p. 932; and

No. 773. GENERAL RADIO CO. *v.* SUPERIOR ELECTRIC CO., *ante*, p. 938. Petitions for rehearing denied.

No. 216. IN RE ESTATE OF WILLIAMS, *ante*, p. 902; and

No. 234. GINSBURG *v.* STERN ET AL., *ante*, p. 930. Petitions for rehearing sur motion for docketing and submission of petitioner's motion to remand denied.

No. 698, Misc. FERMIN *v.* MUNICIPAL COURT DEPARTMENT No. 3, OAKLAND, CALIFORNIA, 375 U. S. 925; and

No. 920, Misc. BRILL *v.* MULLER BROTHERS, INC., *ante*, p. 927. Motions for leave to file petitions for rehearing denied.

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2. *Labor Management Relations Act—Arbitration—Disappearance of employer by merger.*—Rights of employees under collective bargaining agreement are not automatically lost by disappearance of employer via merger, and in appropriate circumstances the successor employer may be required to arbitrate under the contract. John Wiley & Sons v. Livingston, p. 543.

3. *Labor Management Relations Act—Suit to compel arbitration—No-strike clause.*—Union's alleged breach of no-strike clause in collective bargaining agreement did not relieve employer of duty under such agreement to arbitrate; employer can pursue claim for damages for breach of no-strike clause in state court. Packinghouse Workers v. Needham, p. 247.

4. *National Labor Relations Act—Primary picketing—Picketing at railroad entrance gate to plant.*—Primary picketing under § 8 (b) (4) of the National Labor Relations Act includes the right to picket the railroad entrance gate to the struck plant. Steelworkers v. Labor Board, p. 492.

LIBEL. See **Constitutional Law**, V; **Damages**; **Fourteenth Amendment**; **Freedom of the Press.**

LONGSHOREMEN. See **Admiralty.**

MANDAMUS. See **Procedure**, 2; **Venue.**

MARITAL DEDUCTION. See **Taxation.**

MERGERS. See **Antitrust Acts**, 1–4; **Labor**, 2.

MILITARY SERVICE. See **Veterans.**

MISSISSIPPI. See **Contempt**, 2.

MOTOR CARRIERS. See **Transportation**, 1.

NATIONAL BANKS. See **Antitrust Acts**, 3–4.

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NATURAL GAS ACT.

Certificate of convenience and necessity—Maintenance of price conditions—Proposed price changes.—Issuance by the Federal Power Commission of temporary certificate of public convenience and necessity under § 7 (c) of the Natural Gas Act may be conditioned on maintenance of prescribed price during the temporary period; and producer can file proposed price changes under § 4 only after the issuance of permanent or unconditional temporary certificate. Federal Power Comm'n v. Hunt, p. 515.

NATURALIZATION. See **Denaturalization; Immigration and Nationality Act.**

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PATENTS.

1. *Invalidity of design patent—Copying—State unfair competition law.*—Design not entitled to design patent may be copied at will and suit under state unfair competition law for injunction against or damages for copying is in conflict with federal patent law. Compco Corp. v. Day-Brite Lighting, p. 234.

2. *Invalidity of patent—State unfair competition law—Copying.*—State unfair competition law cannot support injunction against or damages for copying products invalidly patented, as such use of state law would conflict with federal patent law. Sears, Roebuck & Co. v. Stiffel Co., p. 225.

PICKETING. See **Labor,** 4.

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PROCEDURE. See also **Contempt; Evidence,** 1; **Labor,** 1; **Venue.**

1. *Supreme Court—Certiorari—Dismissal for lack of jurisdiction—Not final judgment.*—Writ of certiorari dismissed for lack of jurisdiction since denial of preliminary hearing by state court is not "final" judgment under 28 U. S. C. § 1257. Arceneaux v. Louisiana, p. 336.

2. *Court of Appeals—Transfer of venue—Federal Rules of Criminal Procedure.*—District Court's use of an inappropriate factor in denying transfer of venue of criminal prosecution does not empower Court of Appeals to exercise the discretionary function given the trial judge under Rule 21 (b) of Federal Rules of Criminal Procedure by mandamusing the transfer itself. Platt v. Minnesota Mining, p. 240.

3. *District Courts—Transfer of civil action—No change in governing state law.*—Where action is properly brought in transferor District Court and where defendant seeks a transfer under § 1404 (a) of the Judicial Code of 1948, change of venue should not be accompanied by a change in the governing state law. Van Dusen v. Barrack, p. 612.

4. *District Courts—Transfer of civil action—"Where it might have been brought."*—"Where it might have been brought" in § 1404 (a) of the Judicial Code of 1948 is construed with reference to federal venue laws setting forth the districts where such actions "may be

PROCEDURE —Continued.

brought," and not with reference to the laws of the State where the transferee District Court is located. Van Dusen v. Barrack, p. 612.

5. *Eminent domain—Just compensation—Report of commissioners.*—Commission appointed by District Court under Rule 71A (h) of Federal Rules of Civil Procedure to determine just compensation in eminent domain proceedings must set forth basis of ultimate findings of value in its report. United States v. Merz, p. 192.

6. *Time for taking appeal in criminal case—Effect of petition for rehearing.*—Under Rule 11 (2) of this Court, providing that criminal appeal from District Court to this Court must be filed within 30 days after entry of "judgment or order" appealed from, timely filing of petition for rehearing renders judgment nonfinal for appeal purposes, and 30-day period runs from date of denial of rehearing petition. United States v. Healy, p. 75.

PUBLIC OFFICERS. See **Constitutional Law,** V; **Damages; Fourteenth Amendment; Freedom of the Press.**

PUERTO RICANS. See **Constitutional Law,** II; III, 1.

RACIAL DISCRIMINATION. See **Constitutional Law,** II; III, 1–2; VI.

RAILROADS. See **Labor,** 4; **Transportation,** 2–3.

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Estate tax — Widow's allowance — Marital deduction. — Since widow's allowance, which is determined as of time of decedent's death, may be defeated by her death or remarriage, it is terminable within the meaning of § 812 (e)(1)(B) of the Internal Revenue Code of 1939. Jackson v. United States, p. 503.

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1. *Contract carriers—Conversion to common carriers—Limited certificate.*—When Interstate Commerce Commission converts a contract carrier permit to a common carrier certificate it can impose only those restrictions under which carrier was operating before conversion. United States v. Montgomery, Inc., p. 389.

2. *Interstate Commerce Commission—Railroad rates—National Transportation Policy.*—In a hearing under § 4 of the Interstate Commerce Act it was error for the Interstate Commerce Commission not to consider appellants' claims that the proposed rates violated other sections of the Act and were contrary to the National Transportation Policy. Mechling Barge Lines v. United States, p. 375.

3. *Interstate Commerce Commission — Railroads — Intrastate trains.*—Discontinuance of unprofitable intrastate passenger trains may be authorized by Interstate Commerce Commission under 49 U. S. C. § 13a (2) as burden on interstate commerce, without giving effect to prosperity of intrastate operations of carrier as a whole, or any portion thereof. Southern R. Co. v. North Carolina, p. 93.

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Criminal cases—Informers—Disclosure of identity.—Petitioner's claim that he was entitled to informer's name to defend self at trial is rejected where first raised in reply brief on appeal, his previous request having been only in support of motion to suppress the evidence. Rugendorf v. United States, p. 528.

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1. *Invalidity of design patent—State law—Copying.*—Design not entitled to design patent may be copied at will and suit under state unfair competition law for injunction against or damages for copying is in conflict with federal patent law. Compco Corp. v. Day-Brite Lighting, p. 234.

2. *Invalidity of patent—Copying—State law.*—State unfair competition law cannot support injunction against or damages for copying products invalidly patented, as such use of state law would conflict with federal patent law. Sears, Roebuck & Co. v. Stiffel Co., p. 225.

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2. *Seniority rights—Advancement—Universal Military Training and Service Act.*—Reemployed veteran's otherwise automatic advancement did not lack reasonable foreseeability so as to defeat his claim to seniority because of possibility that balance between the supply and demand of labor at certain point and date would have prevented such advancement. Brooks v. Missouri P. R. Co., p. 182.

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1. *"Aircraft piracy."*—Federal Aviation Act, § 902 (i); 49 U. S. C. (Supp. IV) § 1472 (i). United States v. Healy, p. 75.

2. *"Financial or mercantile."*—Foreign Agents Registration Act, § 3 (d); 22 U. S. C. (Supp. IV) § 613 (d). Rabinowitz v. Kennedy, p. 605.

3. *"In the interest of justice."*—Rule 21 (b), Federal Rules of Criminal Procedure. Platt v. Minnesota Mining, p. 240.

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4. *"Line of commerce."*—Clayton Act, § 7; 15 U. S. C. § 18. United States v. El Paso Natural Gas Co., p. 651.

5. *"Primary picketing."*—National Labor Relations Act, § 8 (b) (4); 29 U. S. C. (Supp. IV) § 158 (b) (4). Steelworkers v. Labor Board, p. 492.

6. *"Private and nonpolitical."*—Foreign Agents Registration Act, § 3 (d); 22 U. S. C. (Supp. IV) § 613 (d). Rabinowitz v. Kennedy, p. 605.

7. *"Purchased."*—Article I, § 8, cl. 17, United States Constitution. Humble Pipe Line Co. v. Waggonner, p. 369.

8. *"Residence in the United States continuously."*—Immigration and Nationality Act, § 249; 8 U. S. C. § 1259. Mrvica v. Esperdy, p. 560.

9. *"Sale of electric energy at wholesale in interstate commerce."*—Federal Power Act, § 201 (b); 16 U. S. C. § 824 (b). Federal Power Comm'n v. Southern Cal. Edison, p. 205.

10. *"Section of the country."*—Clayton Act, § 7; 15 U. S. C. § 18. United States v. El Paso Natural Gas Co., p. 651.

11. *"Terminate or fail."*—Internal Revenue Code of 1939, § 812 (e) (1) (B); 26 U. S. C. (1952 ed.) § 812 (e) (1) (B). Jackson v. United States, p. 503.

12. *"Where it might have been brought."*—Judicial Code of 1948, § 1404 (a); 28 U. S. C. § 1404 (a). Van Dusen v. Barrack, p. 612.

13. *"Without loss of seniority."*—Universal Military Training and Service Act, § 9 (c) (1); 50 U. S. C. App. § 459 (c) (1). Tilton v. Missouri P. R. Co., p. 169.

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